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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1916

## No. 53

GREAT NORTHERN RAILWAY COMPANY,
PETITIONER,

vs.

SUNBURST OIL & REFINING COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

FILED JUNE 6, 1916

(36,727)

( )

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1931**

**No.**

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*vs.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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[fol. 1]

**IN DISTRICT COURT OF EIGHTH JUDICIAL DISTRICT OF MONTANA IN AND FOR THE COUNTY OF CASCADE**

SUNBURST OIL & REFINING COMPANY, a Corporation,
Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Defendant

COMPLAINT—Filed April 1, 1930

Comes now the above named plaintiff and for its cause of action against the defendant herein, complains and alleges:

I

That during all the times herein mentioned plaintiff has been and now is a corporation organized and existing under [fol. 2] and by virtue of the laws of the State of Montana, with its principal place of business at Great Falls, Cascade County, Montana.

II

That the Great Northern Railway Company during all the times herein mentioned was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, and doing business in the State of Montana, as a common carrier of freight. That in and for the conduct of its business as such common carrier said defendant owns, maintains, operates, and controls lines of railroad connecting the towns of Kevin and Sunburst, Montana, with the City of Great Falls, Montana.

III

That in connection with its business as a common carrier of freight said defendant promulgated on the 26th day of

January, 1926, effective January 30, 1926, a freight rate on carload shipments of crude petroleum distillate over its said lines from said towns of Kevin and Sunburst, Montana, to the city of Great Falls, Montana, of twenty and one-half (20½¢) cents per hundred weight and that said rate was duly approved by the Railroad Commission of the State of Montana by its order Number 339.

IV

That between the 28th day of August, 1926 and the 4th day of August, 1928, plaintiff caused to be shipped over the lines of said defendant from the towns of Kevin and Sunburst, Montana, to the city of Great Falls, Montana, 266 carloads of crude petroleum distillate. That said shipments were made under the rate established as aforesaid.

[fol. 3]

V

That for the transportation of said crude petroleum distillate, defendant required plaintiff to pay the sum of twenty and one-half (20½¢) cents per hundred pounds; that plaintiff had no means of weighing said crude petroleum distillate at the time it delivered same to defendant; that defendant was possessed of and had available in course of transportation of said crude petroleum distillate, means for ascertaining the exact weight thereof, but failed and neglected to weigh the cars in which said crude petroleum distillate was loaded to ascertain the weight of the quantities of crude petroleum distillate in each of said cars, as was its duty so to do; that defendant estimated the weight of said crude petroleum distillate at 7.4 pounds per gallon and required plaintiff to pay for the transportation thereof upon such basis, but the actual weight of said crude petroleum distillate was 6.6 pounds per gallon; that the total quantities of said crude petroleum distillate so transported by defendant for plaintiff, weighed not to exceed 17,085,342 pounds, for which said defendant was entitled to receive from the defendant for transportation charges the sum of $35,066.33, but defendant estimated the weight of the contents of said cars as 19,182,237 pounds, and compelled defendant to pay to plaintiff for the transportation thereof the sum of $39,310.01.

VI

That plaintiff on or about the 15th day of August, 1929, discovered that the defendant had erroneously determined or estimated the weight of said crude petroleum distillate transported in said cars and that thereby overcharged said plaintiff for the transportation of said cars in the amount [fol. 4] of $4,243.70, which said sum defendant had received from plaintiff for said defendant's use and benefit and without any right thereto.

VII

That on or about the 15th day of August, 1928, plaintiff demanded of defendant payment to plaintiff of said sum of $4,243.70, but defendant refused and still refuses to pay the same or any part thereof to the plaintiff, and has at all times since unjustly and unlawfully withheld and still withholds said money from the plaintiff.

Wherefore plaintiff demands judgment against said defendant for the sum of $4,243.70, with interest thereon at the rate of eight per cent per annum from the 15th day of August, 1928, and for plaintiff's costs and disbursements incurred in and by reason of this action.

Homer G. Murphy, Hurd, Hall & McCabe, Attorneys for Plaintiff.

(Duly verified.)

[File endorsement omitted.]

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In District Court of Cascade County

Answer—Filed April 19, 1930

Comes now the defendant in the above-entitled action and for its answer to the complaint herein:

I

Admits the allegations contained in paragraphs I, II, and IV thereof.

[fol. 5]

II

Admits that on January 26, 1926, the defendant promulgated a tariff, effective January 30, 1926, naming a freight rate of twenty and one-half cents (20½¢) per hundred weight on carload shipments of crude petroleum distillate over its said lines from the towns of Kevin and Sunburst, Mont., to the city of Great Falls, Mont., said tariff being known as G. N. Ry. G. F. O. No. 2073-F and being approved by the Board of Railroad Commissioners of the State of Montana by its order No. 1642.

III

Admits that for the transportation of the crude petroleum distillate referred to in paragraph IV of said complaint the defendant required plaintiff to pay the sum of twenty and one-half cents (20½¢) per hundred pounds, and that defendant estimated the weight of said crude petroleum distillate at seven and four-tenths (7.4) pounds per gallon and required plaintiff to pay for the transportation thereof upon such basis.

IV

Further answering, defendant alleges that said tariff G. N. Ry. G. F. O. No. 2073-F, contained the following provision:

"Minimum and Estimated Weight.—Rates on Petroleum Oils as described herein are subject to Estimated Weight of 7.4 pounds per gallon, also Rules, Minimum Weights and Outage Allowances as provided in connection with Petroleum Crude Oil in Western Classification No. 59, Mont. R. C.-W. C. No. 2 (issued by R. C. Fyfe, Agent), G. N. Ry. G. F. O. No. 800-F, supplements thereto and successive issues thereof."

V

Further answering, defendant alleges that said tariff G. N. Ry. G. F. O. No. 2073-F was the only lawful tariff naming rates on crude petroleum distillate from Kevin and Sun-
[fol. 6] burst, Mont., to Great Falls, Mont., during the period between August 28, 1926, and August 4, 1928.

VI

Further answering, defendant alleges that the charges exacted from plaintiff for the transportation of said 266

carloads of crude petroleum distillate from Kevin and Sunburst, Mont., to Great Falls, Mont., were computed in accordance with the provisions stated in said tariff G. N. Ry. G. F. O. No. 2073-F.

VII

Except as hereinbefore admitted each and every allegation in said complaint contained is hereby specifically denied.

Wherefore defendant prays that plaintiff take nothing in this action and that defendant have its costs and disbursements.

R. J. Hagman, J. P. Plunkett, 1120 Great Northern Bldg., St. Paul, Minn.; W. L. Clift, Great Falls, Mont., Attorneys for Defendant.

(Duly verified)

[File endorsement omitted.]

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In District Court of Cascade County

Reply—Filed April 24, 1930

Comes now the plaintiff above named and for its reply to the answer of defendant on file herein admits, denies and alleges as follows:

I

Replying to paragraph IV of said answer, plaintiff admits the allegations thereof.

[fol. 7]

II

Replying to paragraph V of said answer, plaintiff admits that said tariff G. N. Ry. G. F. O. No. 2073-F was the only tariff naming rates on crude petroleum distillate from Kevin and Sunburst, Montana, to Great Falls, Montana, during the period between August 28th, 1926, and August 4th, 1928. Denies that said tariff so far as it based its rate on the estimated weight and not the actual weight of crude petroleum distillate was lawful or authorized by law.

III

Replying to paragraph VI of said answer, plaintiff denies each and every matter, fact and thing alleged and contained therein.

Wherefore, having fully replied to the answer of defendant on file herein, plaintiff prays judgment as in its complaint set forth.

Hurd, Hall & McCabe, Homer G. Murphy, Attorneys for Plaintiff.

(Duly verified.)

[File endorsement omitted.]

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In District Court of Cascade County

Agreed Statement of Facts—Filed June 21, 1930

Come now the parties above named and stipulate and agree that the facts in the above entitled cause are as here-
[fol. 8] inafter set forth, and submit said cause to the Court for its decision thereon:

I

That during all the times herein mentioned, plaintiff has been and now is a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Great Falls, Cascade County, Montana.

II

That during all the times herein mentioned, defendant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, and doing business in Montana, as a common carrier of freight. That in and for the conduct of its business as such common carrier said defendant owns, maintains, operates and controls lines of railroad connecting the towns of Kevin and Sunburst, Montana, with the city of Great Falls, Montana.

III

That in connection with its business as a common carrier of freight said defendant promulgated on the 25th day of January, 1926 effective January 30th, 1926 a freight rate on carload shipments of crude petroleum distillate over its said lines from said towns of Kevin and Sunburst, Montana, to the city of Great Falls, Montana, at twenty and one-half cents per hundredweight, said tariff being known as G. N. Ry. G. F. O. No. 2073-F and being approved by the Board of Railroad Commissioners of the State of Montana by its order No. 1642.

IV

That said Tariff G. N. Ry. G. F. O. No. 2073-F, contained the following provision:

[fol. 9] "Minimum and Estimated Weights.—Rates on Petroleum Oils as described herein are subject to Estimated Weight of 7.4 pounds per gallon, also Rules, Minimum weights and Outage Allowances as provided in connection with Petroleum Crude Oil in Western Classification No. 59, Mont. R. C.—W. C. No. 2 (issued by R. C. Fyfe, Agent) G. N. Ry. G. F. O. No. 800-F, supplements thereto and successive issues thereof."

V

That said tariff G. N. Ry. G. F. O. No. 2073-F was the only tariff naming rates on crude petroleum distillate from Kevin and Sunburst, Montana, to Great Falls, Montana during the period between August 28th, 1926 and August 4th, 1928.

VI

That between the 28th day of August, 1926 and the 4th day of August, 1928, plaintiff caused to be shipped over the lines of said defendant from the towns of Kevin and Sunburst, Montana to the city of Great Falls, Montana 266 carloads of crude petroleum distillate. That said shipments were made under the rate and tariff aforesaid.

VII

That for the transportation of said crude petroleum distillate, defendant required plaintiff to pay the sum of

twenty and one-half cents per hundred pounds, that plaintiff had no means of weighing said crude petroleum distillate at the time it delivered same to defendant or otherwise, that defendant was possessed of and had available in course of transportation of said crude petroleum distillate, means for ascertaining the exact weight thereof, but did not do so, but estimated the weight of said crude petroleum [fol. 10] distillate at 7.4 pounds per gallon and required plaintiff to pay for the transportation thereof upon such basis, but the actual weight of said crude petroleum distillate was 6.6 pounds per gallon, that the actual weight of said crude petroleum distillate so transported by defendant for plaintiff, was not to exceed 17,085,342 pounds, but that defendant estimated the weight thereof at 19,182,237 pounds and required plaintiff to pay for the transportation thereof the sum of $39,310.01.

VIII

That on or about the 15th day of August, 1928, plaintiff demanded of defendant payment to plaintiff of the sum of $4,243.70, representing the difference between the rate calculated upon the actual weight of said crude petroleum distillate and the amount required to be paid by defendant calculated on the estimated weight thereof as aforesaid, but defendant refused and still refuses to pay said sum or any part thereof to plaintiff.

Dated this 3rd day of June, 1930.

Homer G. Murphy, Hurd, Hall & McCabe, Attorneys for Plaintiff. R. J. Hagman, J. P. Plunkett, W. L. Clift, Attorneys for Defendant.

[File endorsement omitted.]

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[fol. 11] In District Court of Cascade County

Additional Stipulation of Facts—Filed July 25, 1930

Come now the parties above named and stipulate and agree that the following facts, in addition to those heretofore stipulated in this action, shall be considered by the

Court in its determination of the above action and that said facts hereinafter set forth shall be a part and portion of the facts heretofore agreed upon and stipulated, as paragraphs V-A, VII-A and IX thereof.

Dated this 10th day of July, 1930.

Homer G. Murphy, Hurd, Hall & McCabe, Attorneys for Plaintiff. W. L. Clift, R. J. Hagman, J. P. Plunkett, Attorneys for Defendant.

V-A

With the approval of the Board of Railroad Commissioners (Mont. R. C. A. No. 321) a rate of 25 cents was published from Kevin and Sunburst to Kalispell, Mont., effective May 9, 1925, the tariff being known as G. N. G. F. O. No. 2303-B. This tariff carried the proviso that the rates on petroleum oils described therein were subject to an estimated weight of 7.4 pounds per gallon. On August 19, 1925, defendant filed with the Board of Railroad Commissioners its written application for authority to publish a rate of 20½ cents on crude petroleum distillate from Kevin and Sunburst to Great Falls, with the same minimum and estimated weights, rules and regulations, etc., as were contained in G. N. G. F. O. No. 2303-B (Mont. R. C. A. No. 321). Authority for this publication was granted [fol. 12] and on August 26, 1925, the defendant published the 20½-cent rate from Kevin and Sunburst (G. N. G. F. O. No. 2435-A, Mont. R. C. A. No. 326), subject to estimated weight of 7.4 pounds per gallon. This rate was carried forward, subject to the same estimated weight, in G. N. G. F. O. No. 2073-F (Mont. R. C. A. No. 339), issued January 26, 1926, effective January 30, 1926, with Sweet Grass being added as a point of origin.

VII-A

That of said sum of $39,310.01, the sum of $26,068.32 was paid to defendant by plaintiff subsequent to April 2nd, 1927, and that said last mentioned sum so paid represented the freight charges on 12,701,655 pounds of said crude petroleum distillate, based upon an estimated weight of 7.4 pounds per gallon, but that the actual weight of said crude petroleum distillate for which payment was made subse-

quent to April 2nd, 1927, at 6.6 pounds per gallon was 11,349,801 pounds.

IX

That on or about the 19th day of April, 1929, plaintiff herein filed with the Board of Railroad Commissioners of the State of Montana, its complaint alleging that the charges collected by the defendant herein for the transportation of said crude petroleum distillate were unjust and unreasonable to the extent that they exceeded the charges that would have accrued at the rate of twenty and one-half cents per hundred pounds on the basis of a weight of 6.6 pounds per gallon. That after issue was joined between plaintiff and defendant herein in such proceedings a hearing was held at which both plaintiff and defendant herein were represented. That thereafter said Board of Railroad Commissioners of the State of Montana, in said proceeding, duly made, gave and entered its order and findings, a copy of which order is hereto attached, marked ex-[fol. 13] hibit "A" and by this reference made a part hereof.

EXHIBIT "A"

Board of Railroad Commissioners of the State of Montana

Ex Officio

Public Service Commission of Montana, Montana Trade Commission, Montana Irrigation Commission

Certificate

UNITED STATES OF AMERICA,
State of Montana, ss:

I, Francis A. Silver, Secretary of the Board of Railroad Commissioners of the State of Montana and ex-officio Secretary of the ——, do hereby certify that I have compared the annexed copy of Report and Order No. 1551 in Docket No. 1033, Re Sunburst Oil & Refining Company vs. Great Northern Railway Co. with the original thereof filed in the office of said Board of Railroad Commissioners and in my custody, on the 14th day of October, 1929, and that the said

annexed copy is a full, true and correct transcript of said original and of the whole of said original.

In testimony whereof I have hereunto set my hand and affixed the official seal of the Board of Railroad Commissioners of the State of Montana this 9th day of July A. D., One Thousand Nine Hundred and thirty.

Francis A. Silver, Secretary of the Board of Railroad Commissioners of the State of Montana. (Seal of the Board. Ex Officio Secretary of — of Railroad Commissioners.)

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[fol. 14] BEFORE THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA

(Docket No. 1033. Report and Order No. 1551)

(Hearing June 26, 1929. Decided October 14, 1929)

SUNBURST OIL & REFINING CO.

vs.

GREAT NORTHERN RAILWAY CO.

Complaint, alleging estimated weight of crude petroleum distillate unreasonable and transportation charges based thereon excessive. Complaint sustained.

Appearances: M. Homer G. Murphy, Secretary, Sunburst Oil & Refining Company, Great Falls, Montana; Mr. W. D. O'Brien, A. G. F. A., and Mr. J. P. Plunkett, General Attorney, for the Great Northern Railway Company, St. Paul, Minnesota; Francis A. Silver, Counsel, and H. B. Schaefer, Traffic Expert, for the Board.

Before the Board en Banc, at Helena, Montana

By the BOARD:

By complaint filed April 19, 1929, complainant, Sunburst Oil & Refining Company, a corporation, engaged in the business of refining crude petroleum and crude petroleum distillate and the marketing of the products therefrom, with principal place of business at Great Falls,

Montana, alleges that the charges collected by the defendant, Great Northern Railway Company, for the transportation of 266 carloads of crude petroleum distillate in tank cars, from Kevin and Sunburst, Montana, to Great Falls, Montana, between August 28, 1926, and August 4, 1928, at the lawful rate and estimated weight of 7.4 pounds per gallon applied to marked gallon capacity of the cars, were unjust and unreasonable to the extent that they exceeded the [fol. 15] charges that would have accrued at the lawful rate applied on the basis of an estimated weight of 6.6 pounds per gallon. A finding responsive to the allegations aforesaid and reparations in the sum of $4,244.67 is requested. The rate charged is not assailed. Rates will be stated in amounts per 100 pounds.

The record discloses that in 1924 the defendant published a rate of 42 cents on crude petroleum distillate (viz: untreated distillate for further refining), in tank cars, carloads, from Kevin and Sunburst, Montana, to Hillyard, Washington, a suburb of Spokane, (G. N. G. F. O. No. 2268-B). The tariff contained the proviso that the charges on crude petroleum distillate would be computed on estimated weight of 7.4 pounds per gallon on the shell capacity of the tank, in gallons. Subsequently, upon request of interested parties, and with the approval of this Board (Mont. R. C. No. 321), a rate of 25 cents was published from Kevin and Sunburst to Kalispell, Montana, effective May 9, 1925, (G. N. G. F. O. No. 2303-B), the tariff carrying the proviso that the rates on petroleum oils described therein was subject to an estimated weight of 7.4 pounds per gallon. On July 25, 1925, the complainant filed a written request with defendant praying for the establishment of "rates in proportion to that published under Mont. R. C. No. 321." On August 11, 1925, a complaint was filed with the Board requesting the establishment of a fair and equitable rate on crude petroleum distillate from Sunburst to Great Falls. After considerable negotiations between complainant and defendant, the defendant agreed to publish a 20½-cent rate on this commodity from Kevin and Sunburst to Great Falls, and on August 19, 1925, it filed its written application with the Board asking authority to publish said rate "within the [fol. 16] same minimum and estimated weights, rules, regulations, etc., as is contained in G. F. O. No. 2303-B, Mont. R. C. 321." This application was amended on August 26,

1925, so as to include Sweet Grass, Montana, as a point of origin. The complaint was forthwith withdrawn "without prejudice to renewing the same later," (18 M. U. R. —, Inf. Docket 1844), and on August 26, 1925, the defendant published the 20½-cent rate from Kevin and Sunburst (G. N. G. F. O. No. 2435-A, Mont. R. C. No. 326), subject to estimated weight of 7.4 pounds per gallon. This rate was carried forward, subject to the same estimated weight, in G. N. G. F. O. No. 1073-F, Mont. R. C. No. 339, issued January 26, 1926, effective January 30, 1926, Sweet Grass being added as a point of origin.

It is conceded by defendant that the 266 carloads of crude petroleum distillate in question was transported between the dates mentioned and that the freight charges were assessed by defendant and paid by complainant on the basis of 7.4 pounds per gallon and at the rate of 20½ cents in accordance with said last mentioned tariff.

It is likewise conceded that on February 7, 1928, the complainant applied to the defendant for an amendment to tariff No. 2073-F, supra, to provice for and estimated weight of 6.6 pounds per gallon on crude petroleum distillate; that subsequent thereto and during the early summer of 1928, the Western Weighing and Inspection Bureau, at the request of the defendant, made a test covering ten cars which moved from the Kevin-Sunburst field to complainant's refinery at Great Falls; that thereafter and on July 13, 1928, the defendant advised the complainant that it had decided to grant complainant's request for reduction of estimated weight and did publish on July 31, 1928, effective August 4, 1928, its tariff No. 2073-G, Mont. R. C. No. 379, [fol. 17] providing an estimated weight of 6.6 pounds per gallon. In the defendant's application to the Board for authorization for reduction of estimated weight, the carrier represented as the reason and basis for the change that:

"Complaint has been made by an interested shipper, the Sunburst Oil & Refining Company, that the weight on Crude Petroleum Distillate does not exceed in any case 6.563 pounds per gallon as determined by actual laboratory scale weight. This has been substantiated in report by the Western Weighing and Inspection Bureau as result of test made by them on a number of cars."

and requested publication on short notice:

"In order that shippers may have the benefit of the more accurate estimated weights at the earliest possible date."

The reduction of estimated weight was made applicable to all shipments of crude petroleum distillate from the following origin points, to-wit: Sweet Grass, Sunburst, Kevin, Shelby and Great Falls, to the following destination points: Havre, Kalispell, Great Falls, Lewistown and Butte. Thus, all movements of this commodity over the defendant's line in Montana, were made subject to an estimated weight of 6.6 pounds per gallon.

The superintendent of the complainant's refinery, whose qualifications are conceded, testified at the hearing herein that each of the 266 carloads of crude petroleum distillate was tested upon its arrival at the refinery for specific gravity; that the tests were made under prevailing temperature conditions and, by the use of correction tables published by the United States Department of Commerce and approved by the American Petroleum Institute, were translated into terms of specific gravity at 60 degrees Fahrenheit, the accepted standard of measurement. The test in- [fol. 18] dicated that the corrected gravity of the commodity varied between 48 and 54 degrees A. P. I. The National Standard Petroleum Oil Tables, published under date of May 29, 1924, by the United States Bureau of Standards and approved by the American Petroleum Institute, and the Bureau of Mines, were introduced in evidence to show that the weight in pounds per gallon of crude petroleum distillate, varying in specific gravity as above noted, ranged from 6.563 pounds at 48 degrees A. P. I. to 6.350 pounds at 54 degrees A. P. I. It is clear, therefore, from the tests made by complainant and defendant that the actual weight of a gallon of the commodity in question does not exceed 6.6 pounds.

Crude petroleum distillate, as such, is not found in Western, Official, or Southern classifications, which severally assign to crude oil, fuel oil, and gas oil an estimated weight of 7.4 pounds to the gallon. The reasons that prompted the defendant herein to provide that the charges on crude petroleum distillate should be computed on an estimated weight of 7.4 pounds per gallon on the shell capacity of the

tank are not clear. It is evident, however, that no tests were conducted to determine the average actual weight of the commodity and that the carrier assumed that the crude petroleum estimated weight was the proper weight to use for the movement of crude petroleum distillate. It is noted that it still carries the estimated weight of 7.4 pounds per gallon in its interstate tariff (G. N. G. F. O. No. 2268-E, I. C. C. No. A-6565).

While not attempting to defend the estimated weight of 7.4 pounds as being reasonably related to the average actual weight of a gallon of crude petroleum distillate, the defendant asserts that because the tariff naming the 20½-cent rate on this commodity also carried the rule that such [fol. 19] rate was subject to the estimated weight of 7.4 pounds per gallon, this proceeding must be viewed as a complaint against alleged unreasonable freight charges resulting from the combination of the estimated weight and the tariff rate, and that the burden of proving the unreasonableness of the transportation charges assessed and collected rests upon complainant.

In support of its position defendant cites Increased Weights on Kale, Lettuce and Spinach, 61 I. C. C. 586, a proceeding wherein the American Railway Express Company propose to increase, on shipments by express, the estimated weights on spinach and kale shipped in baskets and hampers, and on spinach in barrels. It was shown that the average actual weight of a bushel basket of spinach was 33 pounds, whereas, the estimated weight provided in the tariff was 20 pounds. In refusing permission to the carrier to increase estimated weight on spinach from 20 to 25 pounds, the Commission said:

"Estimated weights are commonly used for the convenience of both the shippers and the carrier, and they should preferably bear some close relation to the actual weights. While the weights proposed are more clearly in harmony with the actual weights than those now maintained, the latter have been in effect since the inception of the industry and the rates have been made with relation thereto. In a case of this kind where the practical and only effect of the proposed increase in estimated weights would be a substantial increase in transportation charges, the respondents should show not only that the proposed estimated weights

are not excessive, but also that the application of the existing rates to such estimated weights will not result in unreasonable transportation charges to the shipper. This has not been done. We accordingly find that the proposed increases have not been justified, and an order will be entered requiring the cancellation of the suspended schedules."

Defendant also cites along the same lines Estimated Weight on Petroleum Crude Oil from Texas, 64 I. C. C. 545, Weights on Berries in Pony Refrigerators, 64 I. C. C. 610, [fol. 20] and Actual Weights on Crude and Fuel Oil, 69 I. C. C. 194. The first mentioned case (an Investigation and Suspension Docket proceeding wherein the respondents did not appear to justify the proposed increases), involved a proposed increase of the estimated weight of petroleum crude oil, in tank-car loads, from Texas to interstate points, from 6.6 to 7.4 pounds per gallon. The Commission noted that the establishment of the 6.6-pound basis was the result of investigations conducted by the carriers and representatives of the petroleum industry some ten years before and had been in effect for a number of years, in so far as traffic east of the Mississippi River was concerned, on all lines from the midcontinent field except the Baltimore & Ohio, which published the 7.4-pound basis. Further, that the proposed change would apply over all lines from Texas producing points but would not change the 6.6-pound basis from producing points in Kansas and Oklahoma. It also found that the proposed change of estimated weight would result in an increase of approximately 12 per cent in the freight charges on crude petroleum from Texas points to destinations east of the Mississippi River. The proposed change was rejected. In the second case cited, the Commission, on the authority of Increased Weights on Kale, etc., supra, refused authority to increase the estimated weights on berries, shipped by express, from points in Florida to destinations throughout the United States, the Commission observing:

"*While the proposed weights are more nearly in harmony with the actual weights than the present estimated weights, we must consider that the rates have been made in relation thereto.*" (Emphasis supplied.)

In the third case cited supra, the carriers proposed to substitute actual weight per gallon in lieu of estimated weight of 7.4 pounds per gallon for the ascertainment of [fol. 21] freight charges on petroleum crude and fuel oil in tank-car loads, from Kansas, Oklahoma and Texas fields to certain destinations in Arizona and New Mexico and to Cannanea, New Mexico. The proposed change, the Commission found, was aimed primarily at Mexican Oil, which was being received at Texas ports and destined largely for the copper mining regions of Arizona and New Mexico. It appears that 7.4 pounds per gallon fairly approximated the average weight of crude oil and fuel oil in this territory. Having found that the estimated weight of 7.4 pounds was not unreasonably low as an average, and not unduly prejudicial to other producers, the carriers' proposal was rejected.

Defendant has not, however, cited any cases before the Interstate Commerce Commission or other tribunal involving a claim of a shipper against a carrier for reparations arising out of the use of estimated weights in excess of actual or average actual weights wherein it has been held that the burden rested upon the shipper not only to establish that the estimated weight was unreasonable in relation to actual or average actual weight but to also prove that the resultant freight charge in and of itself was unreasonable, nor has an examination of precedents revealed any such authority to us. On the other hand, there are numerous cases sustaining the right of a shipper to reparations upon proof only of the unreasonableness of an estimated weight in relation to actual or average actual weight. In Standard Paint Co. vs. Southern Pacific Co., et al., 37 I. C. C. 405, it appeared that the complainant had shipped a number of carloads of liquid asphaltum in tank cars from California to Illinois and paid freight thereon at the lawful rate and estimated weight of 8.6 pounds per gallon applied to the marked gallon capacity of the cars. The proceeding before the Commission was for a reparatory award for the difference between the charges that would have accrued at the [fol. 22] lawful rate applied on the basis of actual weight of the shipments, and the charges actually paid. The rate charged was not assailed. The Commission found that

the transportation charges attacked were unreasonable to the extent that they exceeded the charges that would have accrued at the lawfully published rate based upon an estimated weight of 7.9 pounds per gallon. In National League of Commission Merchants of the United States, et al. vs. Atlantic Coast Line Railroad Co., et al. 39 I. C. C. 563, the complaint alleged that charges collected by defendants for the transportation of a number of carloads of cabbages in crates, shipped from Florida to New York, were unreasonable and excessive in that they were based on an estimated weight of 120 pounds per standard crate, instead of on the basis of actual weight. Complainants did not attack the rate charged nor did they seriously contest the use of estimated weights. The Commission held that the complainants and other shippers similarly situated were entitled to ship cabbages on estimated weights fairly adjusted to the actual weights of their shipments and entered a finding that complainants were damaged to the extent that the charges paid exceeded the charge that would have accrued on the basis of an estmated weight of 115 pounds per standard crate, therein found reasonable. In Frank Simpson Fruit Co. vs. Wells Fargo & Co., 23 I. C. C. 412, a tariff provision estimating the weight of a case of 30 dozen eggs to be 55 pounds was found unreasonable to the extent that it exceeded an estimated weight of 53 pounds and an award of reparation was made. It affirmatively appeared that the tariff rate of $3.00 per one hundred pounds was not under attack. In Henderson Lumber Co. vs. Baltimore & Ohio Railroad Co. et al., 60 I. C. C. 159, the complainant attacked [fol. 23] the use of an estimated weight of 45 pounds per post as applied to a carload shipment of standard 6-foot pit posts moving from West Virginia to Pennsylvania. The rates were not an issue. The estimated weight was found reasonable and reparations denied (see also Sun Co. vs. Indianapolis Southern Railroad Co., et al. 22 I. C. C. 194, and Lemet Salvey Co. vs. Director General, 83 I. C. C. 492).

The only rule fairly deducible from the authorities that has the sanction of logic is that in this character of proceeding where the shipper alleges that he has been subjected to unreasonable transportation charges by reason of the use of estimated weights unreasonably in excess of actual or average weights, it is incumbent upon the shipper to prove that the estimated weight is unreasonable in rela-

tion to the actual or average actual weight, which proof gives rise to the presumption that the carrier having employed an unreasonable and excessive factor in the computation of transportation charges the resultant freight charges were and are unreasonable; in other words, establishes a prima facie case which, in the absence of countervailing evidence, is entitled to prevail. If it be a fact that the level of the rate upon which the shipments moved was influenced in its establishment by the carrier by the estimated weight of the commodity, that is, was essentially predicated in relation to the estimated weight, then, it is our view, the carrier should prove this fact and justify the resulting transportation charge as just and reasonable. This, the carrier has not proved in this case, contending, as above noted, that the burden rested upon complainant not only to prove the unreasonableness of the tariff provision relating to estimated weights but likewise the unreasonableness of the resulting transportation charge. Fur- [fol. 24] ther, the evidence is fairly conclusive that the rate of 20½ cents on crude petroleum distillate was not essentially predicated upon the estimated weight of 7.4 pounds per gallon. It is not probable that the defendant would have seriously entertained the complaint of the Sunburst Oil & Refining Company for a reduction of estimated weights without suggesting that the rate and estimated weight were so related that a decrease in one would work an increase in the other, if such were the facts. Nor would it have called in the Western Weighin- and Inspection Bureau for verification of the refinery's contention that the estimated weight was excessive, nor would it have reduced, upon report of the inspection bureau, its estimated weight from 7.4 pounds per gallon to 6.6 pounds per gallon not only between the points involved in the refinery's complaint but between all points on its system in Montana where commodity rates had been published on crude petroleum distillate, without making some adjustments in the level of rates, if it were true that these rates were predicted specifically upon the assumption that this commodity would move only under an estimated weight of 7.4 pounds. All of the circumstances persuasively argue that the rates were fixed primarily with the idea of stating a just and reasonable rate for the movement of one hundred pounds of crude petroleum distillate and not for the movement of a lesser

amount. The effort to clothe the reduction of estimated weight in the garb of a voluntary reduction of a rate and therefore subject to the rule that a voluntary reduction of a rate by a carrier does not prove the prior rate to be unreasonable or otherwise unlawful, is not sustainable by the record. In the first place, the action of the carrier in the premises was voluntary only in a limited sense as it [fol. 25] only reduced the estimated weight after complaint made to it by an interested shipper and investigation undertaken by an independent agency resulting in a report upholding the shipper's contention. Secondly, the correction of a manifestly erroneous basis of computing transportation charges can with little logic be designated a rate reduction.

Nothing herein said is to be construed as a condemnation of the use of estimated weights. Their use, where for practical reasons it is not possible or inconvenient to ascertain actual weights, is a practice quite generally approved by regulatory bodies and where it appears that the estimate is fairly representative of the actual weight, it is of benefit to both shipper and carrier. They tend to expedite the service and minimize the labor and expense of carriage. It is obvious, however, that if an estimated weight is less than the actual weight, the shipper obtains free transportation of so much of his shipment as in excess of the estimated weight, and that if the estimated weight is greater than the actual weight, the carrier obtains a revenue upon the excess not hauled. It is important, therefore, in our opinion, that estimated weights be fairly adjusted to actual weights.

The argument made by the defendant that the Board, having approved the tariff establishing the 20½-cent rate with the provisions therein prescribing that the rate was subpect to an estimated weight at 7.4 pounds per gallon, the obligation rested upon the defendant, under the Montana statutes, to not deviate from the tariff and that having complied therewith it is exculpated from any liability, is specious. Approval by the Board of a rate, rule or regulation, establishes the prima facie reasonableness thereof but such a rate, rule or regulation is open to attack before the Board at the instance of a shipper or interested party as to just- [fol. 26] ness and reasonableness, and if the assailant establishes that an order of the Board fixing a rate, charge,

toll, regulation or classification is unjust and unreasonable, the Board has not only the power but it is its duty to set the offending order aside and to prescribe in lieu thereof an order comporting with the standards of reasonableness and justness (3796 R. C. M. 1921).

Upon the record we find that the rule of the defendants, above referred to, estimating the weight of a gallon of crude petroleum distillate at 7.4 pounds per gallon was and is unjust and unreasonable to the extent that it exceeded or exceeds 6.6 pounds per gallon; that the shipments involved were made to the complainant as in the complaint alleged; that the complainant paid and bore the charges thereon on the basis of an estimated weight of 7.4 pounds per gallon and that the charges assailed were unreasonable to the extent that they exceeded the charges that would have accrued at the lawfully published rate based upon an estimated weight of 6.6 pounds per gallon and the marked gallon capacity of the cars used. To the extent that the complainant seeks an order requiring the defendant to refund the difference between the charges paid and the charges that would have accrued at the lawfully published rate based upon an estimated weight of 6.6 pounds per gallon, herein found reasonable, it must be denied as this Board is without authority to make an award of reparation (Deney vs. Northern Pacific Ry. Co., 60 Mont. 209). Complainant's remedy, beyond this point, exists only in the courts (idem).

An appropriate order will be entered.

[fol. 27]

## Order

At a session of the Board of Railroad Commissioners of the State of Montana held in its office in the Capitol, Helena, Montana, Monday, October 14, 1929, present Chairman Dennis and Commissioners Boyle and Young, there regularly came before the Board for final action the matters and things involved in Docket No. 1033, and it appearing that the Board has this day issued its report herein, which report is hereby referred to and of this order made a part, and that all matters and things involved have been duly investigated and a public hearing had whereat all persons interested had opportunity to appear and present their respective interests, and now the Board being fully advised in the premises.

It is, therefore, ordered that the complaint of the Sunburst Oil & Refining Company against the Great Northern Railway Company, defendant, shall be, and the same is hereby sustained, except to the extent that the said complaint prays for an order of reparation.

It is further ordered, declared, and found that the rule promulgated by the defendant Great Northern Railway Company in its local tariff on petroleum crude oil and crude petroleum distillate in tank cars, carloads, issued January 26, 1926, effective January 30, 1926, (G. N. Ry. G. F. O. No. 2073-F), providing that the rates on crude petroleum distillate, as described therein, are subject to estimated weight of 7.4 pounds per gallon, was and is unjust and unreasonable to the extent that the said prescribed estimated weight exceeded or exceeds an estimated weight of 6.6 pounds per gallon; that the complainant made the shipments described in the complaint herein and between the dates therein named; that the complainant paid and bore the charges [fol. 28] thereon on the basis of the estimated weight of 7.4 pounds per gallon, prescribed as aforesaid, and that the charges paid and bor-e as aforesaid were and are unreasonable to the extent that they exceeded or exceed the charges that would have accrued at the rate of 20½ cents per one hundred pounds based upon an estimated weight of 6.6 pounds per gallon and the marked gallon capacity of the cars used.

It is further ordered that the Secretary shall serve a true copy of this report and order upon each of the parties hereto and that the same shall be in full force and effect forthwith according to its terms.

Lee Dennis, Chairman; Daniel Boyle, Commissioner; Leonard C. Young, Commissioner, Being and Constituting the Board of Railroad Commissioners of the State of Montana.

Attest: Official.

Francis A. Silver, Secretary. (Seal.)

[File endorsement omitted.]

In District Court of Cascade County

Additional Stipulation of Facts—Filed Oct. 17, 1930

It is hereby stipulated between the parties hereto, through their respective counsel, that paragraph VII of the agreed statement of facts herein shall be amended by the addition thereto of the following words at the end of said paragraph:

[fol. 29] "Which payment was made by plaintiff to defendant in Cascade County, Montana,"

and that said amendment shall be considered by the Court as a part and portion of the facts herein agreed upon and stipulated.

Dated this 8th day of October, 1930.

Hurd, Hall & McCabe, Attorneys for Plaintiff. W. L. Clift, R. J. Hagman, J. P. Plunkett, Attorneys for Defendant.

[File endorsement omitted.]

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In District Court of Cascade County

Judgment—Filed Oct. 17, 1930

This cause having been submitted to the Court herein upon the pleadings and an agreed statement of facts stipulated to by the parties herein, and upon briefs submitted by the respective parties, and the Court having considered said pleadings and said agreed statement of facts, and the briefs of counsel, and being in all things duly advised in the premises, ordered judgment in favor of said plaintiff and against said defendant.

Wherefore, by reason of the premises and upon motion of counsel for the palintiff,

[fol. 30] It is hereby ordered, adjudged, and decreed that plaintiff have and recover of and from said defendant the sum of $2,771.30, being the excessive freight paid by plaintiff to defendant between the 2nd day of April, 1927, and the

1st day of April, 1930, the date of the filing of plaintiff's complaint herein, together with interest thereon at the rate of eight per cent per annum from August 15th, 1928, to the date hereof amounting to $482.20, together with plaintiff's costs and disbursements amounting to the sum of $8.75, making a total judgment of $3,262.25, with interest thereon at the rate of eight per cent per annum from the date hereof until paid.

Dated this 17th day of October, 1930.

H. H. Ewing, Judge.

[File endorsement omitted.]

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IN DISTRICT COURT OF CASCADE COUNTY

NOTICE OF APPEAL FROM JUDGMENT

To Sunburst Oil and Refining Company, a corporation, plaintiff in the above-entitled action, and to Messrs. Hurd, Hall & McCabe, its attorneys:

You, and each of you will please take notice that the defendant in the above entitled cause hereby appeals to the Supreme Court of the State of Montana from the judgment rendered and entered in said cause by the above entitled Court on the 17th day of October, 1930, in favor of the plaintiff and against the defendant, for the principal sum [fol. 31] of $2,771.30, together with interest thereon at the rate of 8% per annum from August 15, 1928, to the 17th day of October, 1930, amounting to the sum of $482.20, and costs amounting to the sum of $8.75, making the total amount of said judgment $3,262.25; which judgment is the final and only judgment rendered, entered and docketed in said cause.

Said defendant appeals from said judgment and the whole thereof.

Dated this 13th day of December, 1930.

R. J. Hagmam, J. P. Plunkett, Attorneys for Defendent, Saint Paul, Minnesota. W. L. Clift, Attorney for Defendant, Great Falls, Montana.

[fol. 32] Clerk's certificate to foregoing transcript omitted in printing.

Due and personal service of the foregoing Transcript on Appeal by receipt of a copy thereof is hereby admitted this 11th day of February, 1931.

Hurd, Hall & McCabe, Attorneys for Respondent.

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[fol. 33] In Supreme Court of Montana, December Term, 1931

No. 6843

Sunburst Oil and Refining Company, a Corporation, Plaintiff and Respondent,

vs.

Great Northern Railway Company, a Corporation, Defendant and Appellant.

Submitted November 7, 1931. Decided January 4, 1932.

[File endorsement omitted.]

[fol. 34] Opinion—Filed Jan. 4, 1932

Mr. Justice Galen delivered the Opinion of the Court.

This is an appeal from a judgment of the district court of Cascade County, entered October 17, 1930, awarding the plaintiff $3,262.25, together with interest and costs, by reason of alleged unjust and unreasonable freight charges collected by the defendant from the plaintiff for the transportation of 266 cars of petroleum distillate on the defendant's railroad from Kevin and Sunburst to Great Falls, between August 28, 1926, and August 4, 1928. The rate charged was in accordance with the published tariff of the board of railroad commissioners then in effect, prescribing a rate of 20½ cents per hundred pounds on crude petroleum distillate from Kevin and Sunburst to Great Falls, subject to an estimated weight of 7.4 pounds per gallon.

On April 19, 1929, the plaintiff filed a complaint with the board of railroad commissioners, in which it is alleged that the correct weight on crude petroleum distillate is 6.653 pounds per gallon, and that as a result of the defendant having computed its charges on the basis of an estimated weight of 7.4 pounds per gallon, the plaintiff was required to pay unjust and unreasonable charges on such shipments. The board found the rates charged to be unjust and unreasonable to the extent that the prescribed estimated weight exceeds or exceeded an estimated weight of 6.6 pounds per gallon. This action was instituted to recover the amount of alleged over payments. On appeal to this court the cause was consolidated with No. 6845, Montana Horse Products Company v. Great Northern Railway [fol. 35] Company, and the two were argued and presented together, it being conceded that each involved the primary question of whether under the laws of this state the board of railroad commissioners has power and authority to make a retroactive order finding that the rates charged and collected on the shipment of petroleum distillate from Kevin and Sunburst to Great Falls of 20½ cents per hundred pounds on an estimated weight per gallon of 7.4 pounds (which rate had been approved by the board and was in effect at the time the shipments were made), were unjust and unreasonable, thus permitting the plaintiff to recover the amount charged and collected on the basis of such tariff and the amount found by the commission to be a reasonable rate based upon the actual weight of crude petroleum distillate.

We have made careful examination of the authorities and are of opinion that our decision this day rendered in the case of Montana Horse Products Co. v. Great Northern Railway Co. is controlling.

In computing freight tariffs, both rate and weight are factors in the equation, and it is common practice with respect to commodities like petroleum to fix an estimated weight which shall govern in computation of the tariff rather than the actual weight (12 I. C. C. 306). In the case of Northern Pacific Ry. Co. v. Department of Public Works, 136 Wash. 389, 240 Pac. 362, wherein it appears that the commission fixed rates on intrastate shipments of certain wood on a basis of 128 cubic feet per cord, and later, in a supplementary order established 192 cubic feet

per cord, as the estimate on which to base the tariff; it was by the court held that the second order was prospective and not retroactive, and that a shipper who shipped such wood during the period the first tariff was in effect on [fol. 36] estimated measurement could not recover reparation of the difference between what he was charged on a 128 cubic foot basis and what the charge would have been on a 192 cubic foot basis, inasmuch as at the time of shipment, rates on the basis of 128 cubic feet were standard and lawful. In the case of Actual Weights on Crude and Fuel Oil, 69 I. C. C. Reports, 194, it is said: "The practice of shipping petroleum oils under estimated weights has long been in effect." In that case the interstate commerce commission ordered the carriers serving the oil fields in Kansas, Oklahoma and Texas to cancel a tariff by which they proposed to substitute actual weights on crude and fuel oil for the estimated weights previously existing as a part of their published tariffs. And in the case of White & Co. v. B. & O. S. W. R. R., 12 I. C. C. 306, it is said:

"The commission has recognized the right of carriers, in order to facilitate the movement of the business, to fix an estimated weight upon certain standard packages upon which a rate is based. The estimated weight is taken into consideration in the making of the rate itself, and of such estimated weights shippers have no right to complain before this commission and secure relief."

The practice of estimating weights is not improper if fairly carried out. (Drinker on The Interstate Commerce Act, Vol. 1, p. 264; Barrow v. Yazoo & M. V. R. Co., 10 I. C. C. 333.)

In the case of Semet-Solvay Co. v. Director General, 83 I. C. C. 492, involving the oil of coal tar shipments, the actual weight of which was found to be 7.38 pounds per gallon, it is said:

"The record leaves no doubt that the shipments consisted of light oil of coal tar from the destructive distillation of coal, which during the period of movement was included in the classification under coal-tar oil, crude, not otherwise indexed by name, and in the commodity tariffs [fol. 37] as coal-tar oil. Since the provision in the commodity tariffs was not amended during the period of move-

ment, the charges on complainant's shipments were correctly assessed on the basis of an estimated weight of 8.5 pounds per gallon."

In the case of Henderson Lumber Co. v. B. & O. Railroad Co., 60 I. C. C. 159, involving the shipment of posts on an estimated weight prescribed in the published tariffs it is said:

"The application of estimated weights, where for practical reasons it is inconvenient or impossible to ascertain actual weights, benefits both shipper and carrier, and is not to be condemned except where it appears that the estimate is not fairly representative of the actual weights." (See also, Sun Co. v. I. S. R. R. Co., 22 I. C. C. 194, and Simpson Fruit Co. v. Wells Fargo & Co., 23 I. C. C. 412.)

Since the finding by the commission as to the unreasonableness of the rate because of the difference between the actual and the estimated weight of the oil operated prospectively only; and the only lawful tariff which could be exacted by the carrier was that which was at the time prescribed in its published tariff as fixed by the commission, it is apparent that the plaintiff is not entitled to damages by way of reparation. Common law rights of the shipper are superseded by the statute.

Under our statutes, so long as the rates established by the commission are in force, they are presumed to be reasonable, and neither the commission nor the courts have power to retroactively declare such established rates unreasonable, and thus permit the recovery of damages to the extent of the overplus paid by a shipper or an undercharge collected by the carrier. (Montana Horse Products Company v. Great Northern Railway Company, supra.) However, because of our misinterpretation of the statutes [fol. 38] in the case of Doney v. Northern Pacific Railway Co., 60 Mont. 209, 199 Pac. 432, pointed out in the Montana Horse Products Company decision, we are constrained to hold, as we did in the last mentioned case, and for the same reasons, that the Doney case measured the rights of the plaintiff herein and prescribed its remedy, notwithstanding our present views fully set forth in the Montana Horse Products Company case.

For the reasons stated, the judgment will stand affirmed. Affirmed.

Albert J. Galen, Associate Justice.

We concur:

Lew. L. Callaway, Chief Justice. Albert H. Angstman, John A. Matthews, Associate Justices.

Mr. Justice FORD:

I concur in the conclusion reached.

S. C. Ford, Associate Justice.

[fol. 39] On Petition for Rehearing

Mr. Justice GALEN delivered the Opinion of the Court.

For the reasons stated in our opinion rendered in the companion case of Montana Horse Products Company v. Great Northern Railway Company, on petition for a rehearing, this day decided, a rehearing is denied.

Albert J. Galen, Associate Justice.

We concur:

Lew L. Callaway, Chief Justice. Albert H. Angstman, John A. Matthews, Associate Justices.

Mr. Justice FORD:

I concur in the result reached.

S. C. Ford, Associate Justice.

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[fol. 40] IN SUPREME COURT OF MONTANA

ORDER DENYING PETITION FOR REHEARING

GALEN, J:

For the reasons stated in our opinion rendered in the companion case of Montana Horse Products Co. v. Great Northern Railway Co., 7 F. (2d) 919, on petition for a rehearing, this day decided, a rehearing is denied.

Callaway, C. J., and Angstman and Matthews, JJ., concur.

FORD, J.:

I concur in the result reached.

[fol. 41] IN SUPREME COURT OF MONTANA

PETITION FOR REHEARING—Filed Jan. 14, 1932

Comes now the appellant in the above entitled action and by its attorneys petitions the Honorable Court for a rehearing therein upon the following grounds:

I

The constitutional questions raised by the appellant, which would be decisive of the case, were overlooked by the court.

II

The decision herein is in conflict with the decision of the Supreme Court of the United States in Arizona Grocery Company v. The Atchison, Topeka & Santa Fe Railway Company, et al., decided January 4, 1932.

Argument

Constitutional Questions

In appealing this case appellant assigned three errors on the part of the court below:

1st. That the court erred in entering judgment in favor of the respondent and against the appellant, in this that under the statutes and laws of Montana the Board of Railroad Commissioners had no power to make a retroactive finding that the rate applied and the charges collected on respondent's shipments were unjust and unreasonable.

2nd. That the court erred in entering judgment in favor of respondent and against the appellant, in this that Chapter 257 of the Revised Codes of Montana 1921, as enforced by the judgment entered by the court below, deprives the appellant of its property without due process of law in violation of Article 3, Section 27, of the Constitution of Montana, and of the Fourteenth Amendment to the Constitution of the United States.

3rd. That the court erred in entering judgment in favor of the respondent and against the appellant, in this that Chapter 257 of the Revised Codes of Montana 1921, as en-

forced by the judgment entered in the lower court, impairs the obligation of the contracts between the respondent and [fol. 42] appellant relating to the transportation of respondent's shipments in violation of Article 3, Section 11, of the Constitution of Montana, and of Article 1, Section 10, of the Constitution of the United States.

The Supreme Court held that the lower court had erred in interpreting the statutes and laws of Montana in such a way as to give to the Board of Railroad Commissioners the power to make a retroactive finding that the rates applied and the charges collected on respondent's shipments were unjust and unreasonable. The Supreme Court said that the Board of Railroad Commissioners had no such power; that its power was limited to changing rates for the future, and that so long as the rates established by the Commission are in force they are presumed to be reasonable and neither the Commission nor the courts have power to retroactively declare such established rates unreasonable and thus permit the recovery of damages to the extent of the overplus paid by the shipper or the undercharge collected by the carrier. We believe that this conclusion is sound and in harmony with the conclusions of other courts on the same point.

However, the court decided that the shipper had been led by surplus language used in the Doney case to believe that he might recover damages from a carrier by obtaining a finding from the Commission that the rates applied and that the charges collected on shipments made in the past were unreasonable and for that reason the doctrine of stare decisis should be applied, and the judgment of the lower court was consequently affirmed, although it is expressly declared that for the future it will be the holding of the court that the Commission does not possess the power which it attempted to exercise.

It was probably due to the conclusion which the court arrived at on the first error assigned that it did not discuss the constitutional questions raised by appellant, but the effect of this decision, at least so far as this case is concerned, was to hold that the Commission had the power to make a retroactive finding of unreasonableness and that upon such finding the lower court was justified in rendering judgment in favor of the respondent. The interpretation of the Montana statutes, which the court announces

will be followed in the future, is undoubtedly correct, but if there was any force to appellant's contention that the judgment of the lower court deprived appellant of its property without due process of law or impaired the obligation of its contracts with respondent, appellant has by this decision been denied its constitutional rights and it re-
[fol. 43] spectfully requests the court to reconsider its decision and to give careful consideration to that part of appellant's brief dealing with these constitutional questions, which will be found on pages 30 to 43 thereof.

On the very day that this court was rendering its decision herein the Supreme Court of the United States handed down a decision in Arizona Grocery Company v. The Atchison, Topeka, & Santa Fe Railway Company, et al. In that case the Interstate Commerce Commission had found on June 22, 1921, that the rate on sugar from various points in California to Phoenix, Arizona, would for the future be unreasonable to the extent that it exceeded 96½ cents. Sometime in 1927 the Commission entered an order in which it found that from and after July 1, 1922, the rates on sugar to Phoenix had been unreasonable to the extent that they had exceeded 73 cents from northern California and 71 cents from southern California, and awarded reparation on that basis. The carriers resisted the reparation award, contending that the Commission had no power to award reparation inasmuch as the rates charged on the shipments in question were no higher than the rates which were fixed by the order of the Commission that was in effect at the time, and that the Commission had no power to make a retroactive order changing rates which it had previously prescribed. The Supreme Court of the United States held that when the Commission in 1921 prescribed a rate of 96½ cents for the future, it was acting in a legislative capacity and when, in 1927, it was sitting to award reparation, it was acting in its judicial capacity and while so acting it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. The court said:

"It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself."

In other words, the court says that neither the legislature nor its creature, the Commission, had the power to declare retroactively that something was unlawful which it had previously declared to be lawful. If this applies to the Interstate Commerce Commission, which merely prescribes maximum rates, leaving the carriers free to publish any rates that do not exceed the maxima prescribed, it should apply a fortiori to the situation here where the appellant was forbidden by law to charge either more or less than the rate fixed by the Commission. For the legislature or the Commission to declare retroactively that a rate was [fol. 44] unlawful which had previously been fixed by the legislature or the Commission as the only lawful rate that could be applied, would deprive the carrier of its vested rights in violation of the due process clause of the Federal and State Constitutions and also in violation of the provisions in those constitutions with reference to the impairment of the obligations of contracts. The decision of the Supreme Court of the United States is decisive of this case in so far as the violations of the Federal Constitution are concerned, and we respectfully urge the court to give the decision referred to careful consideration.

In affirming the judgment of the lower court this court has invoked the rule of stare decisis. Respecting that rule Corpus Juris says:

"It is a well established general rule that where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed. This rule, which is usually known and referred to as the rule of stare decisis, is founded largely upon considerations of expediency and sound principles of public policy, it being indispensable to the due administration of justice, especially by a court of last resort, that a question once deliberately examined and decided should be considered as settled and closed to further argument, and the courts are slow to interfere with the principle announced by the decision and it may be upheld even though they would decide otherwise were the question a new one, although the doctrine will not be applied to the extent of perpetuating error." 15 C. J. 916.

It will be noted that this authority says that where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed. The question of whether or not the Commission had the power to make a retroactive finding with respect to a rate made by it, was not settled by a series of decisions but was stated by the court in the Doney case in a proceeding in which that question had not been raised; in which it was not necessary to decide that question; and in which the court now says in this decision that the language used was not necessary and had no proper place in the opinion. Furthermore, the application of the doctrine of stare decisis to this case would have the effect of perpetuating an error which the court admits was made. It would seem to appellant that under the circumstances the doctrine of stare decisis has no application to this case.

The court says that notwithstanding the fact that the language referred to in the Doney case was not in harmony with the primary holding in the decision; was not necessary to the decision of the case; and had no proper place in [fol. 45] the opinion, nevertheless it was not obiter dictum and the shipper had a right to rely upon this language and that it furnished a just basis for shipper's claim. This is not in harmony with previous decisions of this court in which it has been held that if general expressions go beyond the needs of a particular case they may be respected but ought not to control the judgment in a subsequent suit. For example, in Martien v. Porter, 68 Mont. 450; 219 Pac. 817, the court said:

"In the course of the opinion it was held that the attempted amendment had not become a part of the Constitution because of the defects above pointed out. The question of substantial compliance with the provisions of the Constitution was not considered in the case at all. In fact, under the conditions disclosed by the record, it could not have been properly suggested; but in the course of the opinion Mr. Justice Hunt, speaking of the provisions of the Constitution generally, said:

" 'There is no discretion in that body (the Legislature) to ignore the commands of the fundamental authority, or override its limitations in great or small matters.'

"If by this language the court intended to declare that there must be a literal compliance with every procedural

detail in submitting a proposed amendment to the electors and that rule of construction should still prevail, then the attempted amendment involved in the present case must fall by the wayside. However, in the decision of that case, it was not necessary for the court, in order to reach the conclusion which it did, to go to the extent of declaring so strict a rule of construction as the one which might be deduced from the language used.

"In speaking of the force and effect of prior decisions of the court as precedents, Mr. Chief Justice Marshall, in the case of Cohens v. Virginia, 6 Wheat, 264, 399 (5 L. Ed. 257), used the following language:

" 'It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' "

But whether or not the language used was dictum no vested right of the respondent would be violated by a decision in appellant's favor. No one has a vested right to a particular remedy. 12 C. J. 974. Respondent claims the right to have the reasonableness of the Commission's rates determined by the Commission itself in a subsequent proceeding. The statute provides a method of testing the [fol. 46] reasonableness of Commission-made rates, namely, by a direct appeal to the courts for that purpose. Giving all of the effect to the Doney case that respondent claims for it, it was merely a holding that a shipper had two methods of determining the reasonableness of the Commission's rates, one, by an appeal to the courts, and the other, by a subsequent proceeding before the Commission. The Supreme Court now holds that the shipper has but one remedy and that is the appeal to the courts. No vested right of the shipper is destroyed by the later holding and the judgment of the lower court should be reversed.

In its decision the Supreme Court refers to the case of Montana Nat. Bank v. Yellowstone County, 276 U. S. 499. In that case a national bank in Montana sought to recover from Yellowstone County taxes levied and collected by the county under the statutes of Montana which the bank claimed were invalid as being in conflict with the Revised Statutes, Section 5219, with certain provisions of the Constitution of Montana, and with the Fourteenth Amendment to the Constitution of the United States. At the time the taxes in question were collected the Supreme Court of Montana construed the statutes of the state in such a way as to result in discrimination against national banks and in favor of state banks, and the tax in question was levied and collected under that interpretation of the state law. Later, the Supreme Court of Montana held that the taxing officials were empowered to tax the shares of state banks and thus bring about an equality with national banks, but the Supreme Court of the United States held that this later decision did not prevent the national bank from recovering back the taxes which had been unlawfully collected from it under the previous decision.

This is quite a different situation from the instant case. Here the shipper was not deprived of anything. He paid precisely the same freight charge as would have been paid if the Doney decision had not been rendered. The only difference in his situation that has resulted from the decision in the Doney case is that as a result of that decision he thought he had a choice of remedies, whereas, if the Doney decision had not been rendered he would have had no such belief. But this is not a sufficient ground for the denial of appellant's constitutional rights and the assessment of damages against it in the amount of $4,200.00.

A few words may not be out of place here in answer to [fol. 47] some of the remarks contained in the concurring opinion of Mr. Justice Ford. He states that a common carrier is entitled to a reasonable compensation and no more; that this is an absolute and positive limitation beyond which the Railroad Commission cannot go; and that the rights of a shipper at common law are retained, and the only change that has resulted from the enactment of the Railway Commission Act is the provision of different procedure for the enforcement of the shipper's rights.

It is true that a carrier is entitled to reasonable compensation and no more, but the law has prescribed a means of determining what shall be reasonable compensation. It is provided that this shall be determined in the first instance by the Commission and that either the shipper or the carrier has a right to appeal to the court if the rate fixed by the Commission is not thought to be reasonable. That is the machinery provided by law and the rights of both the shipper and the carrier are amply protected thereby. When the Commission has prescribed a rate it is conclusively presumed to be reasonable until a court upon appeal has found otherwise. There is nothing unfair in such a provision and it applies equally to rates that the shipper may think are too high and to those that a carrier may think are too low.

The concurring opinion also makes the point that a rate may be legal and yet be unlawful in that it is unreasonable. This point was made before the Supreme Court of the United States in the Arizona Grocery Company case, supra, and the court disposed of it in the following language:

"Specific rates prescribed for the future take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers and themselves become the legal rate. As to such rates there is therefore no difference between the legal or published tariff rate and the lawful rate. The carrier cannot change a rate so prescribed and take its chances of an adjudication that the substituted rate will be found reasonable. It is bound to conform to the order of the Commission. If that body sets too low a rate the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future. It cannot have reparation from the shippers for a rate collected under the order upon the ground that it was unreasonably low. This is true because the Commission, in naming the rate, speaks in its quasi-legislative capacity. The prescription of a maximum rate, or maximum and minimum rates, is equally legislative in quality as is the fixing of a specified rate."

This applies with even greater force to rates in Montana where the carrier is prohibited under severe penalties from collecting either more or less than the rate fixed by the Commission. It would certainly be an anomalous situation if a carrier could be subjected to heavy penalties if it failed

[fol. 48] to collect a rate which the Commission had fixed and yet could be subjected to heavy damages in a civil action if it collected such rate. In order that a carrier may be liable in damages for collecting an unreasonable rate it must have some choice as to the rate that it shall collect. Where it has no choice and must collect the rate fixed by law, it cannot be liable in damages for collecting that rate.

Respectfully submitted.

W. L. Clift, Great Falls, Montana; R. J. Hagman, J. P. Plunkett, 1120 Great Northern Bldg., St. Paul, Minnesota, Attorneys for Appellant.

January 2, 1932.

[File endorsement omitted.]

Personal service of the within pet-ion and receipt of copy thereof is hereby acknowledged this 14th day of January 1932.

George E. Hurd, Hall & McCabe, Attorneys for Respondent.

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[fol. 49] IN SUPREME COURT OF MONTANA

OBJECTIONS TO PETITION FOR REHEARING—Filed Jan. 20, 1932

On petition for rehearing, but two grounds are presented:

1. The constitutional questions raised by the appellant, which would be decisive of the case, were overlooked by the court.

2. The decision is in conflict with the decision of the Supreme Court of the United States in Arizona Grocery Company vs. The Atchison, Topeka and Santa Fe Railway Company, et al., decided January 4, 1932.

That neither of such grounds are available to the appellant on petition for rehearing is obvious from the decision of the court. Upon argument in behalf of the appellant this court found that "neither the commission nor the courts have power to retroactively declare such established rates unreasonable, and thus permit the recovery of dam-

ages to the extent of the overplus paid by a shipper or an undercharge collected by the carrier."

Such was the determination so earnestly contended for by appellant both in written and oral argument. That the conclusion was reached by one method suggested by the appellant and not by another is beside the point, and clearly no ground for rehearing. The constitutional argument made by appellant was and is directed at the power of the Railroad Commission to declare a rate retroactively unreasonable. If, as the Court has determined, our statutes confer no such rights, no constitutional question arises and no occasion is presented for deciding an academic question. In fact any discussion by this Court of the Constitutional questions presented by appellant could be only hypothetical. In other words after holding, as it did, that the Commission Law granted no power to determine unreasonableness retroactively, this Court, in order to pass upon the Constitutional questions presented, would be compelled to assume for the sake of argument, that the retroactive power was conferred by the statute, and to have then determined that [fol. 50] the statutes theretofore held Constitutional were hypothetically unconstitutional because they conferred a power which as a matter of law they do not confer. To place such a requirement on a Court of last resort would of course lead to absurdities and contradictions never contemplated. The only duty devolving upon this Court is to declare the law upon the facts presented. There is certainly no duty devolving upon it to declare what might hypothetically be the law.

The same is true with the second ground for rehearing presented by appellant. Since this Court followed the reasoning and reached the conclusion announced in the Arizona Grocery case, it cannot be said to have overlooked that decision. That case, in the lower courts, was relied upon by appellant and is cited in this Court's decision. It is sufficient to ask, what more could be done?

It seems obvious from a reading of the argument set forth in appellant's petition for rehearing that appellant's true complaint is not with respect to the failure of this Court to pass upon the Constitutional features, but rather with respect to its application of the rule of Stare decisis. That the rule so announced is properly applied herein is clear. The entire basis for the proceedings initiated by the re-

spondent and culminating in this appeal was the decision of this court in the Doney case. From the briefs and decision in that case it is clear that the proper methods of procedure and the ultimate rights of parties in similar situations were presented to the Court and deliberately passed upon. This brings the case within the rule of Stare Decisis. 15 C. J. 940.

The action of the Court in this case is certainly not without precedent. People vs. Ryan, (Cal.) 92 Pac. 853.

Indeed, as this Court is at pains to point out, the decision in the Doney case was the result of argument and theories advanced by counsel for the railway companies.

Since the decision in the Doney case, both carriers and shippers have relied thereon. More than this, the Railroad Commission, accepting as it must the decision of the Supreme Court as the final and proper contruction of the Act, has followed the decision it its dealings with carrier and shipper. It must further be borne in mind that the carrier after having voluntarily admitted the excessive es- [fol. 51] timated weight participated without objection in the proceeding before the Board, the sole purpose of which was to have the weight declared unreasonable. Its sole objection was that under the decision in the Doney case reparations could not be awarded respondent. In this last respect the Board agreed with counsel for appellant, citing the Doney Case as its authority.

It seems clear, therefore, that no reason exists herein for the granting of appellant's petition for rehearing. All matters now presented were presented in the original briefs and argument. That the matters so presented were most seriously considered is apparent.

Respondent could well rest its objections to the desired rehearing upon the argument above set forth which has so often been reiterated by this Court. However, we desire to point out to the Court additional reasons why the rehearing may not be granted.

Admittedly respondent followed the requirements of the Railroad Commission Law to the fullest extent possible. By proper complaint is forced the Railroad into a quasi-voluntary reduction of the estimated weight. This reduction was an admission by the Railroad Company that the former estimated weight was unreasonable. Oil did not weigh more in 1927 than it did in 1928 or thereafter. Hav-

ing forced the appellant into making this reduction, respondent then, as it supposed it must under the Doney case, presented the matter to the Commission for its determination as to the reasonableness of the previous weight. Upon such decision it filed the present action.

Whatever may be the effect of the decision of the Railroad Commission, it most certainly constitutes a determination, after hearing, as to the actual weight of the commodity. It is further a determination as required by Section 3796 of the reasonableness of the previous weight estimate.

The complaint in this action, as well as the agreed statement of facts, discloses the following undisputed situation:

"That for the transportation of said crude petroleum distillate, defendant required plaintiff to pay the sum of twenty and one-half cents per hundred pounds, that plaintiff had no means of weighing said crude petroleum distillate at the time it delivered same to defendant or otherwise, that defendant was possessed of and had available in course of transportation of said crude petroleum distillate, means for ascertaining the exact weight thereof, but did not do so, [fol. 52] but estimated the weight of said crude petroleum distillate at 7.4 pounds per gallon and required plaintiff to pay for the transportation thereof upon such basis, but the actual weight of said crude petroleum distillate was 6.6 pounds per gallon, that the actual weight of crude petroleum distillate so transported by defendant for plaintiff was not to exceed 17,085,342 pounds, but that defendant estimated the weight thereof at 19,182,237 pounds and required plaintiff to pay for the transportation therof the sum of $39,-310.01.

VIII

That on or about the 15th day of August, 1928, plaintiff demanded of defendant payment to plaintiff of the sum of $4,243.70 representing the difference between the rate calculated upon the actual weight of said crude petroleum distillate and the amount required to be paid by defendant calculated on the estimated weight thereof as aforesaid, but defendant refused and still refuses to pay said sum or any part thereof to plaintiff."

Our Constitution prevents discriminations and unjust charges by carriers.

Article XV, sections 7 and 9, Section 7851 provides:

"A common carrier is entitled to a reasonable compensation and no more, which he may require to be paid in advance."

Under the Constitutional provisions above and our statute respondent has a cause of action against appellant if the compensation exacted is not reasonable.

This cause of action is not lost to respondent by reason of the Railroad Commission Law, but rather the procedure precedent to recovery is merely changed.

R. C. M. 1921, Sec. 3817.

Doney vs. N. P. Ry. Co., 60 Mont. 209.

Unless the provisions of the Railroad Commission Act provide that the rate promulgated by the Commission is conclusive, respondent then has a right of action of some character.

But our Code merely provides that "in any action, hearing or proceeding in any court, the classifications, rates, tolls, charges, regulations, and orders made, fixed and established by said board shall prima facie be deemed to be just, reasonable and proper."

R. C. M. 1921, Secs. 3809, 3810.

There is here, as we have seen, no controversy as to the actual unreasonableness of the estimated weight of 7.4 pounds per gallon. That fact was originally admitted by [fol. 53] the carrier, (R. p. 17); was determined by the commission; is inferentially agreed to in the agreed statement of facts; and, was found by the lower court under the stipulated facts.

It is uncontradicted that appellant collected and respondent paid freight charges upon more than 2,000,000 pounds of distillate than appellant actually carried. Certainly, unless respondent is to be deprived of its property without due process of law, it has some remedy.

Under such facts the cases of Barris vs. Chicago B. & Q. R. Co., (Ia.) 71 N. W. 339, and, California Adj. Co. vs. S. P. Co., 226 Fed., 349, are much in point.

In the Barris case there was no controversy as to the unreasonableness of the rate. In Iowa, as in Montana, the statute required freight rates to be reasonable.

In Iowa, as in Montana, the rate established by the Commission is but prima facie.

The obligation with respect to reasonable rates is obligatory, under our Constitution and statutes, upon the Commission, the carrier and the shipper.

Cal. Adj. Co. vs. S. P. Co., 226 Fed. 349.

Here appellant does not seek to avoid the present judgment upon the theory that the old estimated weight was reasonable. Admitting actual unreasonableness, appellant lays down a smoke barrage of argument upon the questions, academic here, respecting the power of the commission to declare a rate retroactively unreasonable. Much of such argument is based upon constitutional questions which have no bearing upon the situation.

The sole question to be determined here is whether, under our Constitution and Statutes, the Commission may legalize an unreasonable rate and thus abrogate any remedy a shipper or carrier may have.

We may safely admit here that the Commission may not retroactively declare a rate unreasonable. But such an admission counts for nothing under the undisputed facts here presented.

We have here an admission by the Appellant itself that the weight was unreasonable. We have an approval by the Commission of that admission. We have an allegation of unreasonableness in the Court action and a tacit admission thereof by the appellant. We have, by the judgment of the [fol. 54] lower Court, a finding of unreasonableness.

In such a situation our Constitution and section 7851 compel the carrier to return the excessive payment irrespective of the fact that the original weight was sanctioned by the commission.

The powers of the Commission are not unlimited. In court its order was at the most prima facie—presumptively correct. That presumption was met and overturned.

Under such circumstances no reason exists for learned dissertations upon impairment of contract and due process of law.

Rates are subject to legislative control (Const. Art. XV, Sec. 5). The paramount requisites of a rate are that it shall not discriminate and that it shall be reasonable. (Const. Art. XV, Sec. 7, R. C. M. 1921, Sec. 7851.) If it does either, directly or indirectly, it is illegal and invalid, and no pronouncement of the Railroad Commission can make it otherwise. Nor can the Railroad urge impairment of contract or lack of due process when compelled to disgorge its illegal charges.

Not one of the cases cited and relied upon by appellant deals with a situation such as is here presented.

Upon any theory, therefore, the petition for rehearing should be denied.

Respectfully submitted.

George E. Hurd, Hall & McCabe, Attorneys for Respondent.

Service of the within objections and receipt of a copy thereof admitted this 18th day of January 1932.

J. P. Plunkett, R. J. Hagman, W. L. Clift.

[File endorsement omitted.]

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[fol. 55] IN SUPREME COURT OF MONTANA

Thirty-seventh Day of December Term, 1931

MINUTE ENTRIES

Friday, February 5, 1932.

Court convened pursuant to recess.

Present:

The Hon. Lew. L. Callaway, Chief Justice.
The Hon. Albert J. Galen, Associate Justice.
The Hon. S. C. Ford, Associate Justice.
The Hon. Albert H. Angstman, Associate Justice.
The Hon. John A. Matthews, Associate Justice.
J. W. Crosby, Clerk.
Russell E. Smith, Marshal.

And the following proceedings were had:

6843

SUNBURST OIL & REFINING COMPANY, a Corporation, Respondent,

v.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Appellant

It is ordered that the opinion in the above cause, filed January 4, 1932, be amended by striking therefrom, on page 6 of the original as filed, the following:

"Mr. Justice FORD:

I concur in the conclusion reached, but for reasons stated in the specially concurring opinion in Montana Horse Products case, this day decided, I do not su-scribe to all that is said in the above opinion.

S. C. Ford, Associate Justice."

and substituting in place thereof the following:

"Mr. Justice FORD:

I concur in the conclusion reached.

S. C. Ford, Associate Justice."

Appellant's motion for a rehearing is denied. Opinion by Mr. Justice Galen, Mr. Chief Justice Callaway, Mr. Justice Angstman, and Mr. Justice Matthews concurring, Mr. Justice Ford concurring specially.

There being no further matter presented the court went into recess.

Lew. L. Callaway, Chief Justice.

Attest: J. W. Crosby, Clerk.

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[fol. 56] IN SUPREME COURT OF MONTANA

[Title omitted]

PETITION FOR ORDER STAYING EXECUTION

To the Honorable Chief Justice of the Supreme Court of the State of Montana or to one of its Honorable Associate Justices:

The petition of Great Northern Railway Company, the appellant in the above entitled cause, respectfully shows:

1. That on or about the 17th day of October, 1930, the District Court of the Eighth Judicial District of the State

of Montana, in and for the County of Cascade, passed, rendered and entered its judgment in favor of plaintiff and against defendant in the above entitled cause, for the sum of Two Thousand Seven Hundred Seventy-one & 30/100 Dollars ($2771.30), together with interest thereon at the rate of eight (8) per cent per annum from August 15, 1928 to the 17th day of October, 1930, amounting to the sum of Four Hundred Eighty-two & 20/100 Dollars ($482.20), and costs amounting to the sum of Eight & 75/100 Dollars ($8.75), making a total judgment of Three Thousand Two Hundred Sixty-two & 25/100 Dollars ($3262.25), which said judgment is the final and only judgment entered in said action.

2. That an appeal was duly perfected by said defendant [fol. 57] to the Supreme Court of the State of Montana, wherein said cause and the judgment rendered therein was duly considered and reviewed, and on the 4th day of January, 1932, said Court duly issued its order affirming said judgment. That thereafter, to-wit, on the 14th day of January, 1932, your Petitioner duly filed in said Court its petition for a rehearing of said cause, and that thereafter, to-wit, on the 5th day of February, 1932, an order was duly given and made by said Court denying said petition for rehearing, and that on the 9th day of February, 1932, remittitur was duly issued by this Court and filed in said District Court on the 11th day of February, 1932, remanding said cause to said District Court for such additional proceedings as might be appropriate therein.

3. That by Act of Congress the time within which petition for Writ of Certiorari may be filed in the Supreme Court of the United States is fixed at three months after the entry of judgment or decree, which has been interpreted by said Court to mean three months after petition for rehearing, if one is filed, has been denied, and it is provided in the rules of said Court that the party making application for said writ shall, as a part of said application, furnish the Court with a certified copy of the whole record, and file with the Clerk of said Court thirty printed copies thereof, and that forty printed copies of the petition for said writ, and the brief in support thereof, shall also be filed with said Clerk, and notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief served on counsel for Respondent within ten days after said filing.

4. That your petitioner conceives that it has been deprived of certain rights under the Constitution of the [fol. 58] United States, and desires that the Supreme Court of the United States pass finally upon such questions, and your petitioner is therefore prepared to perfect the record in this case and will file its petition for said writ on or before the 4th day of May, 1932, and, with this end in view, is engaged in the preparation of said petition, and is proceeding with said application with due diligence; but as said Supreme Court of the United States will adjourn during the last week of May, 1932, for the summer months, said Court may not act on said petition for a Writ of Certiorari prior to adjournment.

That your petitioner is advised that in order that the proceedings may remain in their present status pending the disposition of such petition for said writ, an order of one of the Justices of this Court is required to stay the issuance of an execution to enforce said judgment.

Wherefore your petitioner prays that the Honorable Chief Justice of the above entitled Court or one of its Associate Justices make and enter an order herein staying the issuance of execution on or under said judgment, pending the filing of the aforesaid petition for Writ of Certiorari in the Supreme Court of the United States, and whatever action said Court may take thereon, until the 15th day of June, 1932, or until such further time as may be necessary to prevent the issuance and levy of execution on or under said judgment pending the final decision of the said Supreme Court of the United States in said cause, upon the filing of a good and sufficient Supersedeas Bond or Undertaking in the said District Court in the sum of Seventy-five Hundred Dollars ($7500.00), to be approved by the Justice making said order.

Dated this 24th day of March, 1932.

W. L. Clift, Attorney for Petitioner, Great Falls, [fol. 59] Montana. R. J. Hagman, J. P. Plunkett, Attorneys for Petitioner, St. Paul, Minnesota.

[fol. 60] IN SUPREME COURT OF MONTANA

[Title omitted]

ORDER STAYING EXECUTION—Filed March 24, 1932

Upon the application of the Great Northern Railway Company, defendant and appellant in the above entitled

cause, for an order of one of the Justices of this Court staying the issuance of execution on that certain judgment rendered and entered in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, in favor of the plaintiff, and against the defendant therein, on the 17th day of October, 1930, for the sum of Two Thousand Seven Hundred Seventy-one & 30/100 Dollars ($2771.30), together with interest thereon at the rate of eight (8) percent per annum from August 15, 1928 to the 17th day of October, 1930, amounting to the sum of Four Hundred Eighty-two & 20/100 Dollars ($482.20), and costs amounting to the sum of Eight & 75/100 Dollars ($8.75), making a total judgment of Three Thousand Two Hundred Sixty-two & 25/100 Dollars ($3262.25), which said judgment is the final and only judgment rendered in said action; and upon consideration of the foregoing petition, from which it appears that said Railway Company is about to apply to the Supreme Court of the United States for a Writ of Certiorari to review the [fol. 61] judgment and order of this Court affirming said judgment, and upon the motion of W. L. Clift, Esq., one of the attorneys for said Great Northern Railway Company, defendant and appellant in the above entitled cause,

It is hereby ordered that execution in the above entitled cause be stayed to and including the 15th day of June, 1932, or until such later date as may be necessary to prevent the issuance and levy of execution on or under said judgment, pending a final decision of the Supreme Court of the United States on said Railway Company's petition, upon the filing in said District Court of a good and sufficient Supersedeas Bond or Undertaking in the sum of Seventy-five Hundred Dollars ($7500.00) to be approved by the undersigned.

Dated this 24 day of March, 1932.

Llwellyn L. Callaway, Chief Justice.

[File endorsement omitted.]

Service of within papers by receipt of copies thereof is hereby acknowledged this 26th day of March, 1932.

Geo. E. Hurd, Atty. for Plaintiff.

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[fol. 62] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of Montana is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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CHARLES ELMORE CR
CLE

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1931**

---

**No. 53**

---

GREAT NORTHERN RAILWAY COMPANY,
PETITIONER,

*vs.*

SUNBURST OIL & REFINING COMPANY AND JOHN H. HAMILTON, RECEIVER OF SUNBURST OIL & REFINING COMPANY.

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**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA AND BRIEF IN SUPPORT THEREOF.**

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W. L. CLIFT,
R. J. HAGMAN,
J. P. PLUNKETT,
*Counsel for Petitioner.*

**(36,727)**

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# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1931.

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## No. 913

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GREAT NORTHERN RAILWAY COMPANY,
PETITIONER,

*vs.*

SUNBURST OIL & REFINING COMPANY AND JOHN H. HAMILTON, RECEIVER OF SUNBURST OIL & REFINING COMPANY, RESPONDENTS.

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## PETITION FOR WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

The petition of the Great Northern Railway Company respectfully shows to this Honorable Court:

### Summary Statement of the Matter Involved.

This proceeding involves the right of a shipper to recover damages by way of reparations on intrastate shipments that moved on a rate previously fixed by a

State commission. The precise question is: Where the State law requires railroad rates to be fixed by the State commission and forbids railroad companies to charge rates at variance therewith, and the State commission fixes a rate and it is charged by the railroad company, may a shipper who has paid that rate and who has thereafter obtained a finding of unreasonableness from the Commission recover from the railroad company, as damages by way of reparation, the difference between the rate charged and the rate subsequently found reasonable by the Commission? The decision of the State court is contrary to the decision of this Court on the same question with respect to interstate shipments in the case of *Arizona Grocery Company* v. *A., T. & S. F. Ry. Co. et al.*, decided January 4, 1932.

The statutes of the State of Montana vest in the Board of Railroad Commissioners the power and make it the duty of the Board to make all necessary rates, charges and regulations governing the transportation of freight and passengers by railroad within that State (Secs. 3794-3796, Revised Codes of Montana 1921). The statutes also forbid, under heavy penalties, the charging or receiving by a railroad company of a greater or less compensation for transportation services performed than that fixed by the Board (Secs. 3804-3805).

The Board fixed a rate of 20½ cents per 100 pounds on crude petroleum distillate from Kevin and Sunburst to Great Falls, Montana, subject to an estimated weight of 7.4 pounds per gallon. Respondent shipped 266 carloads of this commodity from Kevin

and Sunburst to Great Falls and freight charges were collected thereon at the rate of 20½ cents per 100 pounds computed by using the estimated weight of 7.4 pounds per gallon (Rec. pp. 6-10).

Thereafter, and on April 19, 1929, respondent filed a complaint with the Board alleging that the estimated weight provision was unjust and unreasonable (Rec. p. 10). After hearing, the Board on October 14, 1929, entered an order in which it ordered, declared and found that the estimated weight of 7.4 pounds per gallon, was unjust and unreasonable to the extent that it exceeded 6.6 pounds per gallon. It further found that the charges paid by respondent on said 266 cars of crude petroleum distillate were unreasonable to the extent that they exceeded charges that would have accrued by the use of the estimated weight of 6.6 pounds per gallon (Rec. pp. 10 to 22).

Thereafter, and on April 1, 1930, respondent brought an action against the petitioner in the District Court of Cascade County, Montana, to recover excess charges alleged to have been collected (Rec. pp. 1-3). The case was tried on an agreed statement of facts (Rec. pp. 7-23). On October 17, 1930, judgment was entered in favor of respondent in the amount of $3,262.25 (Rec. pp. 23-24). Petitioner perfected an appeal to the Supreme Court of Montana (Rec. p. 24). Three errors of the trial court were specified (Rec. pp. 30-31):

> 1. The court erred in entering judgment in favor of respondent and against the appellant in this, that under the statutes and laws of Montana the Board of Railroad Commissioners had no power to make a retroactive finding that

the rate of 20½ cents per 100 pounds on crude petroleum distillate from Kevin and Sunburst to Great Falls, based upon an estimated weight of 7.4 pounds per gallon, was unjust and unreasonable.

2. The court erred in entering judgment in favor of respondent and against the appellant in this, that Chapter 257 of the Revised Codes of Montana 1921, as enforced by the order for judgment and the judgment entered in this proceeding, deprives the appellant of its property without due process of law in violation of Article III, Section 27, of the Constitution of Montana, and of the Fourteenth Amendment to the Constitution of the United States.

3. The court erred in entering judgment in favor of respondent and against the appellant in this, that Chapter 257 of the Revised Codes of Montana 1921, as enforced by the order for judgment and the judgment entered in this proceeding, impairs the obligation of the contracts between the respondent and the appellant relating to the transportation of the 266 carloads of crude petroleum distillate in question in violation of Article III, Section 11, of the Constitution of Montana and of Article I, Section 10, of the Constitution of the United States.

Thereafter, and on November 9, 1931, John H. Hamilton was appointed Receiver of the respondent by an order duly made and given in the United States District Court in and for the District of Montana, and thereafter duly qualified as of said 9th day of November, 1931.

Thereafter, and on January 4, 1932, the Supreme Court of Montana rendered a decision in which it

held that the practice of using estimated weights in computing freight charges on a commodity like petroleum was not improper; that the Board of Railroad Commissioners had no power to make the finding of unreasonableness and order referred to and that respondent was not entitled to recover damages by way of reparation on account of the transportation of the 266 carloads in question. However, following its decision in *Montana Horse Products Company* v. *Great Northern Ry. Co.* (decided same day), the Supreme Court held that, under the doctrine of *stare decisis*, because of its misinterpretation of the statutes in a prior case (*Doney* v. *Northern Pacific Ry. Co.*, 60 Mont. 209, 199 Pac. 432), the judgment of the trial court should be affirmed (Rec. pp. 25-29).

In a petition for rehearing petitioner again pressed for consideration the constitutional questions raised, and called to the attention of the court the fact that its decision was contrary to the decision of this Court in *Arizona Grocery Company* v. *A., T. & S. F. Ry. Co. et al.*, decided January 4, 1932 (Rec. pp. 30-31). On February 5, 1932, the petition was denied (Rec. 45).

**Reasons Relied on For Allowance of the Writ.**

1. Petitioner charged and collected for the transportation of the 266 carloads in question rates and charges previously fixed by the Board of Railroad Commissioners, which petitioner was obliged to do under severe penalties prescribed by the State law. The freight charges so collected became the property of petitioner. For the State now to require the pe-

titioner to return a portion of such charges to the respondent would deprive petitioner of its property without due process, in violation of the Fourteenth Amendment to the Constitution of the United States.

2. Petitioner entered into contracts with respondent for the transportation of the 266 carloads in question under the tariff rates previously fixed by the Board. Those contracts were executed by the transportation of the goods and the payment of the freight charges. For the State now to require petitioner to return a portion of such charges to the respondent would impair the obligation of such contracts in violation of Article I, Section 10, of the Constitution of the United States.

3. The importance of this case is far beyond the amount of money involved in this proceeding. It involves the question whether a party can be deprived of a right protected by the Constitution of the United States simply by the Court invoking the doctrine of *stare decisis* where its previous decision was admittedly erroneous dictum.

4. Many other States have laws similar to those of the State of Montana, under which railroad rates are fixed by a State commission. The decision of the questions involved in this case is of great importance to the railroads and shippers in those States as well as in the State of Montana.

5. The decision of the Supreme Court of Montana in this case is contrary to the decision of this Court in *Arizona Grocery Company* v. *A., T. & S. F. Ry. Co.*

*et al.*, decided January 4, 1932. This was called to the attention of the Supreme Court of Montana in the petition for rehearing filed January 14, 1932, and denied February 5, 1932 (Rec. pp. 30, 45).

6. The fact that the Supreme Court of Montana stated in its opinion that the Board had no power to enter such an order and that respondent was not entitled to recover damages by way of reparation in connection with the shipments in question does not affect the situation in any way. The actual decision of this case is the affirmance of the judgment of the trial court. By that affirmance it has construed the statutes of the State of Montana in such a manner as to render them repugnant to the Constitution of the United States. It is immaterial that the Supreme Court of Montana was impelled to that decision, not by reason, but by what it conceived to be its duty to follow its prior decision however erroneous that might be. Petitioner's constitutional rights have been violated, nevertheless.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Montana, commanding that court to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 6843, Sunburst Oil & Refining Company, a corporation, respondent, *vs.* Great Northern Railway Company, a

corporation, appellant, and that said judgment of the Supreme Court of the State of Montana may be reversed by this Honorable Court, and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

GREAT NORTHERN RAILWAY COMPANY,

By W. L. CLIFT,
R. J. HAGMAN,
J. P. PLUNKETT,
*Counsel for Petitioner.*

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

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# No. 913

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GREAT NORTHERN RAILWAY COMPANY,
PETITIONER,

*vs.*

SUNBURST OIL & REFINING COMPANY AND JOHN H. HAMILTON, RECEIVER OF SUNBURST OIL & REFINING COMPANY, RESPONDENTS.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### I.

### The Opinions of the Court Below.

The opinion of the Supreme Court of the State of Montana dated January 4, 1932, is reported in *Sunburst Oil & Refining Co.* v. *Great Northern Ry. Co.*, 7 Pac. (2nd) 927, and is found at page 25 of the record and in Appendix "A" to this brief.

The opinion of the Supreme Court of the State of Montana dated January 4, 1932, in *Montana Horse Products Co.* v. *Great Northern Ry. Co.*, followed in the opinion in *Sunburst Oil & Refining Co.* v. *Great Northern Ry. Co.*, is reported in 7 Pac. (2nd) 919 and is found in Appendix "B" to this brief.

## II.

### Jurisdiction.

The judgment of the Supreme Court of the State of Montana was entered on January 4, 1932 (Rec. p. 25). The petition for rehearing filed by petitioner was denied February 5, 1932 (Rec. p. 45), less than three months prior to the date of application for this writ of certiorari (U. S. Code, Title 28, Sec. 350).

The jurisdiction of the Supreme Court is invoked under paragraph (*b*) of Section 237 of the Judicial Code, as amended and re-enacted by the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 344).

## III.

### Statement of the Case.

A statement of the case has been given in the petition under the heading "Summary Statement of the Matter Involved."

## IV.

### Specifications of Error.

1. The Supreme Court of the State of Montana erred in entering judgment in favor of respondent and

against the petitioner in this, that Chapter 257 of the Revised Codes of Montana, 1921, as enforced by the judgment entered in this proceeding, deprives the petitioner of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of the State of Montana erred in entering judgment in favor of respondent and against the petitioner in this, that Chapter 257 of the Revised Codes of Montana, 1921, as enforced by the judgment entered in this proceeding, impairs the obligation of the contracts between the petitioner and the respondent, in violation of Article I, Section 10, of the Constitution of the United States.

## V.

## ARGUMENT.

### A.

**The construction given to Chapter 257 of the Revised Codes of Montana, 1921, by the Supreme Court of Montana, must be determined by its judgment in the case and not by statements contained in its opinion.**

The Supreme Court of Montana conceded all the points made by petitioner before that court. It said that the Board of Railroad Commissioners had no power to make a retroactive finding of unreasonableness and that the respondent was not entitled to recover damages by way of reparation (Rec. p. 26). In *Montana Horse Products Co.* v. *Great Northern Ry.*

*Co.* (*supra*), involving the same question and decided the same day, it said that it would be an anomalous situation were the Board, acting as a quasi-judicial tribunal, permitted to find that the carrier had violated the law because it charged a rate prescribed by the Board itself acting in its legislative capacity (App. B, p. 39). It also stated that the language found in *Doney* v. *Northern Pacific Ry. Co.*, 60 Mont. 209, 199 Pac. 432, in which it was said that the Board could make such a finding, was not necessary to a decision of that case and had no proper place in the opinion (App. B, pp. 34-35). Yet in spite of these statements it held that under the doctrine of *stare decisis* it must follow the *obiter dictum* in the *Doney case,* which the court conceded was not the law, and for that reason it affirmed the judgment of the trial court.

This is an action in tort to recover damages by way of reparation for the charging and collecting of unreasonable freight charges. It is based upon a finding of past unreasonableness made by the Board of Railroad Commissioners. If the Board had no power to make such a finding in this case respondent has no cause of action. In entering judgment in favor of respondent the trial court necessarily construed the statutes of Montana as giving to the Board the power to make such a finding and as giving to respondent a cause of action based on such a finding. In affirming the judgment of the trial court the Supreme Court necessarily approved that construction. It is immaterial by what method of reasoning the court arrived at that decision. The fact is that the judgment is inconsistent with expressions contained in the opinion. But it is the judg-

ment itself that determines the construction given to the Montana statutes.

B.

**Chapter 257 of the Revised Codes of Montana, 1921, as enforced by the judgment of the Supreme Court of Montana, deprives the petitioner of its property without due process of law.**

From the very foundation of our Government it has been held that where once the right to private property has become vested in an individual it is beyond the power of legislatures to take that property from him without compensation. *Calder* v. *Bull*, 3 Dallas 386, 388; *Fletcher* v. *Peck*, 6 Cranch 87, 135; *Missouri Pac. Ry.* v. *Nebraska*, 164 U. S. 403, 417. Since the passage of the Fourteenth Amendment such a taking of property by a state has been held to be a violation of that amendment. *C., B. & Q. R. R.* v. *Chicago*, 166 U. S. 226, 236. An order of a state railroad commission made under an act of the state is a legislative act under delegated power and has the same force as if made by the legislature and for that reason is a law passed by the state within the meaning of the Federal Constitution. *L. & N. Ry.* v. *Garrett*, 231 U. S. 298.

The state, through its duly authorized agency, the Board, determined and fixed the reasonable rate and charges to be collected on these shipments; the transportation service was performed in consideration of such rate and charges; the charges so fixed were collected. The Board could not repeal its own enactment with retroactive effect; the limit of its power as of

that of the legislature itself was to lay down a rule of conduct for the future. *Arizona Grocery Co.* v. *A., T. & S. F. Ry.*, decided by this court January 4, 1932. The charges collected became the absolute property of the petitioner. To deprive one of property acquired by a contract executed in accordance with the then existing law, and give it to another is to deprive one of his property without due process. *Osborn* v. *Nicholson*, 13 Wallace 654.

In the *Arizona Grocery Company case* the Supreme Court had before it the question whether or not the Interstate Commerce Commission had the power to award reparation where charges had been collected on a rate that had previously been approved by that Commission. The Supreme Court held that it did not have that power, saying:

> "The Commission's error arose from a failure to recognize that when it prescribed a maximum reasonable rate for the future it was performing a legislative function, and that when it was sitting to award reparation it was sitting for a purpose judicial in its nature. In the second capacity, while not bound by the rule of *res judicata*, it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, *as of that of the legislature itself.*" (Italics added.)

Any limitation on the power of the legislature must necessarily be constitutional in character. There-

fore, while the Supreme Court did not say so in so many words, it is obvious that it had in mind this constitutional objection. If neither the Interstate Commerce Commission nor the legislature could make a retroactive finding of unreasonableness with respect to a rate that had previously been found merely to be a maximum reasonable rate, *a fortiori* it would be beyond the power of this Board or the legislature to make a retroactive finding of unreasonableness with respect to a rate which had been fixed absolutely by the Board and from which carriers were forbidden to deviate in any respect.

For these reasons it is submitted that Chapter 257 of the Revised Codes of Montana 1921, as enforced by the judgment of the Supreme Court of Montana, deprives the petitioner of its property without due process of law.

C.

**Chapter 257, Revised Codes of Montana, as construed by the judgment in this case impairs the obligation of contracts between the petitioner and the respondent.**

From time to time petitioner and respondent entered into various contracts for the transportation of the 266 carloads of crude petroleum distillate involved in this proceeding. In compliance with these contracts the transportation of these shipments was performed by the petitioner and the compensation for such transportation was paid by the respondent. This compensation was computed by the use of the rates and charges prescribed by the Board of Railroad Com-

missioners. These contracts were executed. Respondent now seeks to recover back a portion of the consideration paid.

The prohibition against the impairment of the obligation of contracts applies to executed as well as to executory contracts. *Fletcher* v. *Peck*, 6 Cranch 87; *Dartmouth College* v. *Woodward*, 4 Wheaton 517; *Green* v. *Biddle*, 8 Wheaton 1; *Ogden* v. *Saunders*, 12 Wheaton 213; *Von Hoffman* v. *City of Quincy*, 4 Wallace 535. The prohibition also extends to a decision of the Board of Railroad Commissioners. *L. & N. Ry.* v. *Garrett*, 231 U. S. 298. The laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. *Edwards* v. *Kearzey*, 96 U. S. 595.

These contracts were valid at the time they were made; they provided for the payment as freight charges of the only amounts that under the laws of the state could lawfully be charged or received for the services rendered. To have made any different contract or to have charged or received any different sum either greater or less than that exacted, would have subjected petitioner to severe penalties. The order of the Board, prescribing the rate and estimated weight applied to these shipments, was just as much a part of these contracts as if it had been expressly referred to or incorporated in their terms. For the Board to make a subsequent order finding retroactively that the rate and estimated weight it had previously prescribed was unjust and unreasonable, thereby modifying said contracts and requiring petitioner to return to re-

spondent a part of the consideration paid, would impair the obligations of these contracts, in violation of Article I, Section 10, of the Constitution of the United States.

> "And the sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the construction of the law." *Ohio Life Insurance and Trust Co.* v. *Debolt*, 16 Howard 416, 432.

D.

**Respondent had no vested right in the construction contained in the obiter dictum of the Doney case that should be protected by invoking the doctrine of stare decisis.**

In its further opinion on petition for rehearing in *Montana Horse Products Company* v. *Great Northern Railway Company*, 7 Pac. 919, 926, 927, referred to in the opinion in this case, the Supreme Court of Montana makes the point that the construction of the Montana statute contained in the *obiter dictum* of the *Doney case* became "a part of it as much as though written into it" and respondent's rights having accrued while that construction of the statute was in effect could not be divested without impairing the obligation of contracts between petitioner and respondent.

If the legislature had written into the statute the

construction contained in the *obiter dictum* of the *Doney case*, the statute would be repugnant to the Constitution of the United States and, therefore, invalid and no rights could be asserted under it. Likewise, if this construction is given to the statute by a decision of the state court, it is invalid and respondent has no right of action under it.

## Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the errors committed by the Supreme Court of the State of Montana may be corrected, and that to such end a writ of certiorari should be granted by this Court and this Court should review the decision of the Supreme Court of Montana and finally reverse it.

Respectfully submitted,

W. L. CLIFT,
R. J. HAGMAN,
J. P. PLUNKETT,
*Counsel for Petitioner.*

## APPENDIX "A".

STATE OF MONTANA:

IN THE SUPREME COURT.

DECEMBER TERM, 1931.

No. 6843.

SUNBURST OIL & REFINING CO., *Pltf. and Resp.*,

*vs.*

GREAT NORTHERN RY. CO., *Def. and Appellant.*

Subm. November 7, 1931. Dec. January 4, 1932.

**Opinion by Mr. Justice Galen, Concurred in by All the Justices, Mr. Justice Ford Concurring Specially.**

This is an appeal from a judgment of the district court of Cascade County, entered October 17, 1930, awarding the plaintiff $3,262.25, together with interest and costs, by reason of alleged unjust and unreasonable freight charges collected by the defendant from the plaintiff for the transportation of 266 cars of petroleum distillate on the defendant's railroad from Kevin and Sunburst to Great Falls, between August 28, 1926, and August 4, 1928. The rate charged was in accordance with the published tariff of the board of railroad commissioners then in effect, prescribing a rate of 20½ cents per hundred pounds on crude petroleum distillate from Kevin and Sunburst to Great Falls, subject to an estimated weight of 7.4 pounds per gallon.

On April 19, 1929, the plaintiff filed a complaint with the board of railroad commissioners, in which it is

alleged that the correct rate on crude petroleum distillate is 6.653 pounds per gallon, and that as a result of the defendant having computed its charges on the basis of an estimated weight of 7.4 pounds per gallon, the plaintiff was required to pay unjust and unreasonable charges on such shipments. The board found the rates charged to be unjust and unreasonable to the extent that the prescribed estimated weight exceeds or exceeded an estimated weight of 6.6 pounds per gallon. This action was instituted to recover the amount of alleged over payments. On appeal to this court the cause was consolidated with No. 6845, *Montana Horse Products Company* v. *Great Northern Railway Company,* and the two were argued and presented together, it being conceded that each involved the primary question of whether under the laws of this state the board of railroad commissioners has power and authority to make a retroactive order finding that the rates charged and collected on the shipment of petroleum distillate from Kevin and Sunburst to Great Falls of 20½ cents per hundred pounds on an estimated weight per gallon of 7.4 pounds (which rate had been approved by the board and was in effect at the time the shipments were made), were unjust and unreasonable thus permitting the plaintiff to recover the amount charged and collected on the basis of such tariff and the amount found by the commission to be a reasonable rate based upon the actual weight of crude petroleum distillate.

We have made careful examination of the authorities and are of opinion that our decision this day rendered in the case of *Montana Horse Products Co.* v. *Great Northern Railway Co.* is controlling.

In computing freight tariffs, both rate and weight are factors in the equation and it is common practice with respect to commodities like petroleum to fix an estimated weight which shall govern in computation of

the tariff rather than the actual weight. (12 I. C. C. 306.) In the case of *Northern Pacific Ry. Co.* v. *Department of Public Works,* 136 Wash. 389, 240 Pac. 362, wherein it appears that the commission fixed rates on intrastate shipments of certain wood on a basis of 128 cubic feet per cord, and later, in a supplementary order established 192 cubic feet per cord, as the estimate on which to base the tariff; it was by the court held that the second order was prospective and not retroactive, and that a shipper who shipped such wood during the period the first tariff was in effect on estimated measurement could not recover reparation of the difference between what he was charged on a 128 cubic foot basis and what the charge would have been on a 192 cubic foot basis, inasmuch as at the time of shipment, rates on the basis of 128 cubic feet were standard and lawful. In the case of Actual Weights on Crude and Fuel Oil, 69 I. C. C. Reports, 194, it is said: "The practice of shipping petroleum oils under estimated weights has long been in effect." In that case the interstate commerce commission ordered the carriers serving the oil fields in Kansas, Oklahoma and Texas to cancel a tariff by which they proposed to substitute actual weights on crude and fuel oil for the estimated weights previously existing as a part of their published tariffs. And in the case of *White & Co.* v. *B. & O. S. W. R. R.,* 12 I. C. C. 306, it is said: "The commission has recognized the right of carriers, in order to facilitate the movement of the business, to fix an estimated weight upon certain standard packages upon which a rate is based. The estimated weight is taken into consideration in the making of the rate itself, and of such estimated weights shippers have no right to complain before this commission and secure relief."

The practice of estimating weights is not improper if fairly carried out. (Drinker on The Interstate

Commerce Act, Vol. 1, p. 264; *Barrow* v. *Yazoo & M. V. R. Co.*, 10 I. C. C. 333.)

In the case of *Semet-Solvay Co.* v. *Director General*, 83 I. C. C. 492, involving the oil of coal tar shipments, the actual weight of which was found to be 7.38 pounds per gallon, it is said: "The record leaves no doubt that the shipments consisted of light oil of coal tar from the destructive distillation of coal, which during the period of movement was included in the classification under coal-tar oil, crude, not otherwise indexed by name, and in the commodity tariffs as coal-tar oil. Since the provision in the commodity tariffs was not amended during the period of movement, the charges on complainant's shipments were correctly assessed on the basis of an estimated weight of 8.5 pounds per gallon."

In the case of *Henderson Lumber Co.* v. *B. & O. Railroad Co.*, 60 I. C. C. 159, involving the shipment of posts on an estimated weight prescribed in the published tariffs it is said: "The application of estimated weights, where for practical reasons it is inconvenient or impossible to ascertain actual weights, benefits both shipper and carrier, and is not to be condemned except where it appears that the estimate is not fairly representative of the actual weights." (See also, *Sun Co.* v. *I. S. R. R. Co.*, 22 I. C. C. 194, and *Simpson Fruit Co.* v. *Wells Fargo & Co.*, 23 I. C. C. 412.)

Since the finding by the commission as to the unreasonableness of the rate because of the difference between the actual and the estimated weight of the oil operated prospectively only; and the only lawful tariff which could be exacted by the carrier was that which was at the time prescribed in its published tariff as fixed by the commission, it is apparent that the plaintiff is not entitled to damages by way of reparation. Common law rights of the shipper are superseded by the statute.

Under our statutes, so long as the rates established by the commission are in force, they are presumed to be reasonable, and neither the commission nor the courts have power to retroactively declare such established rates unreasonable, and thus permit the recovery of damages to the extent of the overplus paid by a shipper or an undercharge collected by the carrier. (*Montana Horse Products Company* v. *Great Northern Railway Company, supra.*) However, because of our misinterpretation of the statutes in the case of *Doney* v. *Northern Pacific Railway Co.*, 60 Mont. 209, 199 Pac. 432, pointed out in the Montana Horse Products Company decision, we are constrained to hold, as we did in the last mentioned case, and for the same reasons, that the *Doney case* measured the rights of the plaintiff herein and prescribed its remedy, notwithstanding our present views fully set forth in the *Montana Horse Products Company case.*

For the reasons stated, the judgment will stand affirmed.

Mr. Justice FORD:

I concur in the conclusion reached.

S. C. FORD,
*Associate Justice.*

## APPENDIX "B".

SUPREME COURT OF MONTANA.

Jan. 4, 1932.

No. 6845.

MONTANA HORSE PRODUCTS CO.

*v.*

GREAT NORTHERN RY. CO.

**On Petition for Rehearing.**

Rehearing Denied Feb. 5, 1932.

GALEN, *J.:*

This action was instituted by the plaintiff in the district court of Silver Bow county to recover damages from the defendant in the sum of $7,512.25, alleged to have been suffered by reason of unjust and unreasonable freight charges collected by the defendant in Silver Bow county for the transportation over its lines to Butte from various points in this state of 166 carloads of range horses suitable only for slaughter and canning purposes, between June 25 and September 26, 1927. Issue was joined by answer and reply, and the cause was submitted to the court for decision upon an agreed statement of facts. The court found in favor of the plaintiff in accordance with the prayer of its complaint and entered judgment accordingly, from which the defendant has appealed.

The only question presented by the defendant's assignments of error, necessary for consideration in disposition of this appeal, is whether under the laws of this state the board of railroad commissioners has

power and authority to make a retroactive order finding that the rates charged and collected on the shipment of such horses (which rates had been previously approved by the board) were unjust and unreasonable, thus permitting the plaintiff to recover the difference between the amount charged and collected and the amount found by the commission to be a reasonable rate.

There is no dispute as to the facts, from which it appears that on April 8, 1926, the Great Northern Railway Company filed with the board of railroad commissioners its petition for authority to file and make effective upon one day's notice a freight tariff, prescribing new rates from various Montana points on its line to the city of Butte upon range horses suitable chiefly for slaughter; that on April 14, 1926, such petition was allowed, the authorization being designated "Montana R. C. No. 1828", and on April 14, 1926, the railroad company filed such tariff to become effective April 21, 1926, being known and designated as "G. N. Ry. G. F. O. No. 2508-A." Subsequently, during the period from June 25, 1927, to September 22, 1927, both inclusive, the plaintiff shipped from various points within the state over the defendant's lines to the city of Butte, 166 carloads of range horses chiefly valuable for slaughter, and made payment of freight charges thereon on the basis of the tariff designated "G. N. Ry. G. F. O. 2508-A, Montana R. C. Authorization No. 1828". In consequence, the railway company received and collected on such shipments the aggregate sum of $15,024.50, which amount so charged and imposed by the railway company and paid by the plaintiff was computed on the basis of the rates contained in tariff G. N. G. F. O. No. 2508-A, published by it under authorization of the board of railroad commissioners, which had not been canceled or superseded prior to

September 24, 1927, and "was the only tariff in effect naming rates on horses suitable for slaughtering", from Montana points on the defendant's railroad to Butte, during the period from June 25 to September 22, 1927. By letter under date of June 12, 1927, the board of railroad commissioners requested the defendant Great Northern Railway Company, the Northern Pacific Railway Company, and the Chicago, Milwaukee & St. Paul Railway Company to reduce their then existing rates to Butte by 50 per cent. The Chicago, Milwaukee & St. Paul Railway Company responded to the board's suggestion, agreeing to a 50 per cent. reduction effective June 24, 1927; the Northern Pacific Railway Company did likewise, effective September 22, 1927. On July 14, 1927, the defendant Great Northern Railway Company declined to make such reduction, but later, on September 21, 1927, it communicated with the board and requested authority to make such half rates effective at once, and the necessary authority having been given, they became effective as to the Great Northern Railway Company September 24, 1927.

On April 9, 1928, the plaintiff filed with the board of railroad commissioners its complaint against the defendant railway company alleging that the rates charged and the freight charges collected from and paid by the plaintiff on such horse shipments were unjust and unreasonable to the extent that they exceeded 50 per cent. of the rates named in G. N. Ry. G. F. O. No. 2508-A. Due service of the complaint was made upon the defendant railway company, but it did not file any answer or make other appearance, or offer objections. The matter was noticed for public hearing and the defendant was duly notified of the time and place, but failed to make appearance at the hearing, or at any time, to raise objection to the proceedings or the relief sought by the plaintiff, and did not offer any evidence at the hearing. After the con-

clusion of the hearing, on November 4, 1929, the board of railroad commissioners found and adjudged that the rate charged on such shipments and collected by the railway company was unjust and unreasonable to the extent that it exceeded 50 per cent. of the published rates filed with the board. In the order, among other things, it is stated, so far as here pertinent, that:

> "If, then, the rates on range horses that became effective on September 24, 1927, were reasonable rates, and in the circumstances we are convinced that they were, we are likewise of the opinion that the rates paid on the shipments involved in this complaint were unreasonable and excessive to the extent that they exceeded fifty per cent. thereof, and it so held. From this conclusion it should not be understood that the fact that a rate has been reduced, in and of itself, makes for findings of unreasonableness prior thereto. * * * It is ordered, decreed and found, that the Montana Horse Products Company, a corporation, made the shipments described in the complaint herein and between the dates therein named; that said complainant paid and bore the charges thereon on the basis of the rates published in the tariffs of the defendant and on file with the board, in the amount of $15,024.50, and that the charges paid and bore as aforesaid were and are unreasonable to the extent that they exceeded or exceed the charges that would have accrued thereon on the basis of fifty per cent. of the rates published and imposed as aforesaid, to-wit: the sum of $7,512.25."

The powers of the board of railroad commissioners in the the regulation of railroads are prescribed by chapter 257 of the Revised Codes of 1921. By section 3794 it is provided, so far as pertinent, that power

and authority is by the act vested in the board of railroad commissioners, and it is thereby made its duty "to adopt, as soon as practicable, * * * all necessary rates, charges, and regulations to govern and regulate freight and passenger tariffs, to correct abuses, and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and to make the same effective by enforcing the penalties prescribed in this act. The said board shall have the power, and it shall be its duty, to fairly and justly classify and subdivide all freight and merchandise of whatsoever character that may be transported over railroads of this state, into such general and special classes or subdivisions as may be deemed necessary or expedient. The said board may fix different rates for different railroads and for different lines under the same management, or for different parts of the same lines, if found necessary to do justice, and may make rates for express companies different from the rates fixed for railroads."

Section 3803 provides that the determination of the board fixing any classification or rate may be reviewed by the district court. Section 3804 reads, in part: "If any railroad subject hereto, directly or indirectly or by any special rate, rebate, draw-back, or other device, shall charge, demand, or receive from any person, firm, or corporation, a greater or less compensation for any service rendered, or to be rendered, in the transportation of property subject to the provisions of this act, than that fixed by the said board of railroad commissioners for such service", shall be subject to the payment of heavy penalties prescribed. Section 3805 makes any railroad subject to the act guilty of extortion for charging or collecting from any shipper a greater rate than that established by the board of railroad commissioners, and prescribes penalties. Section 3806 provides that the district

court shall have jurisdiction to enforce the rates, classifications, rulings, and orders made or established by the board, and section 3807 provides for appeals to this court from the judgment of any district court in any action arising under the provisions of the act.

Section 3796 provides that the board of railroad commissioners "shall have the power from time to time to change, alter, amend, or abolish any classification or rate established by it when deemed necessary, and such amended, altered, or new classifications or rates shall be put into effect in the same manner as original classifications. * * * The said board must, within forty days after the filing with such board of a complaint by a shipper, or other person interested, proceed to investigate and determine the justness and reasonableness of any classification, rate, charge, toll, regulation or order made by said board."

Section 3797 provides that the board shall have the general supervision of all railroads, express companies, car companies, sleeping car companies, freight and freight line companies, and any common carrier engaged in the transportation of passengers or property in this state, in all matters appertaining to the duty of the board and within its power and authority under the provisions of the act. It shall investigate any alleged neglect or violation of the laws of the state by any railroad or other company above specified doing business therein. Section 3803 provides that the determination of the board fixing any classification or rate or the refusal of the board to fix such classification or rate may be reviewed by the district court. Sections 3804 and 3805 provide that if any railroad shall charge or receive a greater or less compensation for any transportation service performed than that fixed by the board for such service, the railroad shall be liable to the payment of heavy

penalties for such violation. Section 3806 provides that the district court shall have jurisdiction to enforce the rates, classifications, rulings, and orders made or established by the commission. Section 3807 provides for appeals to the Supreme Court from the judgment of the district court.

Section 3808 provides that any sum paid to a railroad in excess of the rates fixed by the board for such service may be recovered from the railroad in an action instituted in the district court of the county in which such payment was made, provided such action is brought within twelve months from the date of such payment. Section 3809 provides that any railroad may bring an action in the district court of the county where its principal office or place of business is situated, or any county where such rate or classification of the board is made applicable, to determine whether or not any such rate or classification is just and reasonable, "provided, that until the final decision in any such action the classification, rate, toll, charge, regulation, or order of the board affecting rates or charges shall be deemed to be final and conclusive." Section 3810 provides that any shipper may bring an action in the district court to determine whether or not any such rate or classification is just and reasonable. It also provides "that until the final decision in any such action, the classification, rate, toll, charge, regulation, or order of the board affecting rates or charges shall be deemed to be final and conclusive; * * * and provided further, that in any action, hearing, or proceeding in any court, the classifications, rates, tolls, charges, regulations, and orders made, fixed, and established by said board shall *prima facie* be deemed to be just, reasonable, and proper." Sections 3811 and 3812 provide further penalties for violation by a railroad of any order of the commission. Section 3816 makes it the duty of the board to see that

the provisions of this section and of all laws concerning railroads are enforced and obeyed.

From the foregoing analysis of our statutes it appears that the board is given the power and it is made its duty to prescribe all intrastate rates for the transportation of freight and passengers, and that when so established, carriers are forbidden under severe penalties prescribed to charge more or less than those fixed by the board. Shippers are given the right to maintain an action to recover any amount charged by the carrier in excess of the fixed rates, and either the shippers or the carriers may appeal to the courts where it is contended that the rates established by the board are unjust or unreasonable. There is no provision in the law giving the board authority to find that a rate fixed by it was in the past unjust or unreasonable, its powers being limited to the changing or modification of existing rates as to the future. And as seen by the provisions of section 3794, the board is commanded to make the rates by it established effective "by enforcing the penalties prescribed in this act." Not otherwise.

As noted from the language employed, the statutes of Montana respecting the making of rates differ materially from the Interstate Commerce Act, and the laws of many other states, in that under our statutes the rates are established by the board of railroad commissioners, whereas under the provisions of the federal act (36 Stat. 554, 49 U. S. C. A. Sec. 16) and those of some other states, the rates are fixed by the carriers with power to review their reasonableness vested in the regulatory body. Our statute differs from the federal act in that under the federal act the interstate commerce commission is authorized to order payment by way of damages in reparation by reason of an unreasonable, unjust, or discriminatory rate fixed by the carrier and exacted of a shipper, whereas under our

law the schedule of rates approved by the board are declared to be deemed *prima facie* just, reasonable, and proper, and until final decision by the district court in an action by a railroad or by a shipper or person interested, "the classification, rate, toll, charge, regulation, or order of the board affecting rates or charges shall be deemed to be final and conclusive" (sections 3809-3810), and the carrier is made subject to heavy penalties for charging a greater or lesser rate than that established by the board (3804, 3805, 3811, 3812) and declared to be guilty of extortion for charging or collecting a greater rate than that established by the board (section 3804).

Counsel for the railway company, for the shipper, and for the board of railroad commissioners, all agree that the holding of this court in the case of *Doney* v. *Northern Pacific Railway Co.*, 60 Mont. 209, 199 P. 432, 439, is controlling in the cause now before us; but they are not in accord in interpreting the conclusions reached and the force and effect of that decision. In our opinion, that decision properly understood and interpreted, is conclusive in this case. There we held in effect, and on more mature consideration we think we were correct, that a tariff duly filed with and published by the board of railroad commissioners has the force and effect of a statute binding alike upon the shipper and carrier until changed or modified by the board; and that the shipper's remedy provided by section 3808, where excess rates have been charged and exacted by a railroad, is by an action to recover the amount paid "in excess of the rates, tolls, or charges fixed and established by the board for such service," provided the action is commenced in the district court of the county within which the payment was made, within a period of twelve months from the date of payment. We further held that there is no provision in the railroad commission act giving the board

power to make rates retroactive, and that there is no express provision authorizing the board, in the event that it determines under section 3796, or the court determines under section 3803 or 3810, "that any rates fixed by the Board are unjust or unreasonable, to allow reparation to the shipper for the amount paid during the time such rate as fixed by the Board was in force. The rate established by the Board being *prima facie* a valid and reasonable rate, presumption as to its validity and reasonableness will be indulged, until its unreasonableness or discriminatory character is found by the Board itself. Upon change made in the rate by action of the Board, this presumption ceases. * * * The shipper's remedy is to promptly have the rate modified, if unreasonable, by the Commission, or to have the reasonableness thereof determined by a court in an action to review the reasonableness of the rates as fixed and established. * * * Plaintiff's remedy was to apply to the Railroad Commission for a modification of the rate established or for the fixing of a rate in the event no rate had been established, and upon its refusal to grant relief as against an alleged excessive or discriminatory rate, he is entitled to have the matter determined by a court of competent jurisdiction. The statute differs from the Federal Act in that under the latter Act the Interstate Commerce Commission is expressly authorized to order the railroad to pay to the complainant the sum it may find he has been damaged by reason of an unjust rate or discrimination in violation of the Act (36 Stat. 554; U. S. Comp. St. Sec. 8584 (49 U. S. C. A. Sec. 16) ), while under the state Act reparation may only be had in a court proceeding based upon the findings and records of the Board of Railroad Commissioners (section 4389, R. C.). * * * Were this not the correct procedure under the statute, great and inevitable confusion and uncertainty would result, as there might arise a multi-

plicity of suits with varied determinations in the several jurisdictions of the state."

In the decision in that case we note an inconsistency in the opinion, embraced in two paragraphs appearing on page 236 of 60 Mont., 199 P. 432, 440, which read as follows:

> "The reasoning of the above cases applies with equal force to our statute and to the lack of jurisdiction of the courts to pass upon the reasonableness of the rates and discriminations before the Commission has taken action thereon. In other words, before any shipper can recover in the courts damages for excess rates or discriminations, the discrimination or unreasonableness of the rate must first be passed upon by the special tribunal expressly created and authorized by law to handle such matters—The Railroad Commission.
>
> "The fact that the Railroad Commission is not authorized, upon determining that a rate is unreasonable or discriminatory, to order reparation, does not prevent shipper, after the rate has been so determined by the special tribunal created for that express purpose, from maintaining an action in court to recover damages sustained by him as a result of such unreasonable or discriminatory rate. His action is based upon the fact that such rate has been so declared by the proper tribunal, and the court merely determines the amount of damages, if any, sustained."

(1) In view of the conclusions theretofore reached in that opinion, these paragraphs of the decision are not supported by the language employed, by the plain language of our statutes, or by the primary holding in that decision, were not necessary to a decision of

the case, and have no proper place in the opinion. They are hereby expressly overruled, as is also any other language in that opinion at variance with this decision. Having written that opinion for the court, the author hereof expresses apology for having misled the profession, and welcomes this opportunity to correct the error made in interpreting our statutes. A correct interpretation of our statutory law upon the subject is a matter of greatest importance to shippers, to the board of railroad commissioners, and to the carriers. The province of this court is to interpret the law as it finds it rather than to legislate.

(2, 3) Rates under the Interstate Commerce Act are voluntary rates initiated and filed by the carriers, rather than rates prescribed or approved by the commission as under our laws. *Doney* v. *Northern Pacific Ry. Co., supra; Mathieson Alkali Works* v. *Norfolk & Western Ry.*, 147 Va. 426, 137 S. E. 608; *Miller Mill Co.* v. *L. & N. R. R.*, 207 Ala. 253, 92 So. 797; *Interstate Commerce Commission* v. *L. & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431. And the Interstate Commerce Commission is given power by the act to declare a rate unreasonable or discriminatory retroactively and to award reparation. No such power is given to the commission under our statutes; but rather it is required by our laws on the subject to establish the reasonableness of freight tariffs published and "to make the same effective by enforcing the penalties" prescribed in the act.

(4-7) The principle is well established that to determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial act, and when the commission finds a rate which has been charged and collected unreasonable, it is exercising a quasi judicial function. To determine what rate shall be charged in the future is a

legislative or administrative act, and when a commission prescribes a rate which shall be charged in the future, it is exercising a quasi legislative function. *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pac. Ry. Co.*, 167 U. S. 479, 17 S. Ct. 896, 42 L. Ed. 243; *Louisville & Nashville Railway Co.* v. *Garrett*, 231 U. S. 298, 34 S. Ct. 48, 58 L. Ed. 229; *Great Northern Ry. Co.* v. *Merchants' Elevator Co.*, 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943; *Atchison, T. & S. F. Ry. Co.* v. *Arizona Grocery Co.* (C. C. A.), 49 F. (2d) 563. A determination of the unreasonableness of an existing tariff by the commission does not interfere with rates paid while it existed, since it constituted the legal rate and the only one upon which the carrier could base its charges under severe penalties. After any such determination of unreasonableness by the commission, a quasi-judicial act, a new tariff in consequence established or approved by it as an administrative function, necessarily operates only upon future shipments. As to past transactions neither the shipper nor the railroad has any right of reparation where the rate charged and paid was that established by the commission. Common-law rights of the shipper are superseded by the statute.

(8, 9) It is plain that under our law a carrier is prohibited from collecting for any service rendered either more or less than the rates fixed by the board. In conformity with such established rates, and during the time they were in effect, between June 25 and September 22, 1927, the plaintiff shipped 166 carloads of horses over its lines to Butte for slaughter, for which service the plaintiff as shipper paid the rates prescribed by the board, which were the only rates then in effect. On September 21, 1927, the defendant railroad requested authority to reduce its rates on such horses 50 per cent., effective at once, and authority was

granted to it to make such reduction September 24, 1927. However, such voluntary reduction of the rate by the carrier did not make the prior rate unlawful, unreasonable, or discriminatory, or the basis of an action for damages. *Doney* v. *Northern Pac. Ry. Co., supra.*

The case of *Mathieson Alkali Works* v. *Norfolk & Western Railway,* above cited, arose under statutory provisions like our own, and a similar state of facts. The action was against the carrier to recover overcharges. The charges complained of were fixed by the commission by tariffs filed and approved in conformity with the statute, and the charges exacted were not in excess of those thus established by the commission. It was held by the Supreme Court of Virginia, and we think correctly, that since the charges were in accordance with the rates prescribed by the commission, the plaintiff could not recover for overcharges, notwithstanding a subsequent finding by the commission that the rates so prescribed were unreasonable. See also *Eagle Cotton Oil Co.* v. *Southern Ry. Co.* (*D. C.*), 46 F. (2d) 1006.

In *Miller Mill Co.* v. *L. & N. R. R. Co.,* 207 Ala. 253, 92 So. 797, 800, the Supreme Court of Alabama reached the same conclusion in a case involving somewhat the same state of facts, and the courts of other states where, under the law, the rates are prescribed by the regulatory board, have held that such board is without authority to declare such rates unreasonable retroactively. *Young Heading Co.* v. *Payne,* 127 Miss. 48, 89, So. 782; *Texas & P. Ry. Co.* v. *Railroad Commission,* 137 La. 1059, 69 So. 837; *Northern Pacific Ry. Co.* v. *Department of Public Works,* 136 Wash. 389, 240, p. 362, 364; *Producers' Refining Co.* v. *Missouri, K. & T. Ry. Co. (Tex. Com. App.),* 13 S. W. (2d) 680. In the case of *Miller Mill Co.* v. *L. & N. R. R. Co., supra,* the court held that:

> "Manifestly there can be but one lawful rate in force at any given time, and that rate by the very terms of the statutes quoted, is the rate which has been filed with and approved by the Commission, and published by the carrier. Behind that rate, so long as it remains unchanged, and so far as its application to specific shipments is concerned, neither shipper nor carrier can go, and courts cannot inquire." Citing *Adams* v. *Central of Georgia Ry. Co.*, 198 Ala. 433, 73 So. 650.

In the case of *Northern Pacific Railway Co.* v. *Department of Public Works, supra,* it appeared that the original order of the department of public works fixed rates on intrastate shipments of certain wood on the basis of 128 cubic feet per cord, and later in a supplemental order fixed the basis on 192 cubic feet per cord. The court held that:

> "It is manifest, therefore, that since all the shipments complained of by the Roosevelt Transfer & Fuel Company were received during the period when the department order was in force fixing the standard at 128 cubic feet per cord, there was nothing illegal in what appellant did. The rates and standards were in force, and while in force were the only lawful rates and standards. *C., B. & Q. R. Co.* v. *Merriam* (C. C. A. 8), 297 F. 1. The orders of the department were prospective and in no way retroactive by their own terms."

See also construction placed on Arizona statute of similar import, in case of *El Paso & S. W. R. Co.* v. *Arizona Commission (D. C.)*, 51 F. (2d) 573.

In the case of *Producers' Refining Co.* v. *Missoui, K. & T. Ry. Co., supra,* the court held that where the rail-

road commission pursuant to its duty fixed a rate as reasonable to be charged by a railroad, the carrier had no option other than to comply with the law under pain of severe penalties prescribed by the statute. This is in accord with our views of the proper construction to be placed upon the statutes of Montana. Undoubtedly our laws authorize an interference with the managerial function of carriers in the fixing of tariffs, but since such is the system prescribed by our lawmaking body, it must be followed until such time as it is changed or modified by legislative fiat. It truly would be an anomalous situation, were the commission, acting as a quasi-judicial tribunal, permitted to find that the carrier had violated the law because it charged a rate prescribed by the commission itself, acting in its legislative capacity. The commission's findings, lowering the rates upon finding existing rates unreasonable, are not, and could not lawfully be made, retroactive; and it is noted that it did not attempt to make it so. In the order it is stated that from the conclusion reached as to the unreasonableness of existing rates it is "not to be understood that the fact that the rate has been reduced, in and of itself, makes for findings of unreasonableness prior thereto."

Under our statutes, so long as the rates established by the commission are in force, they are presumed to be reasonable, and neither the commission nor the courts have power to retroactively declare such established rates unreasonable, and thus permit the recovery of damages to the extent of the overplus paid by a shipper or an undercharge collected by the carrier.

But what of the effect of our misinterpretation of the law in the Doney case above quoted? While it is of the greatest importance that our statutes be properly interpreted and applied in the future administration of the law, what is to be said as to the shipper's rights in this action in consequence of our former de-

cision as respects the shipments in question? It is to be noted that the rates exacted by the defendant railway company were by the shipper paid under protest and that later, upon application made to the board by the shipper, they were declared to be unreasonable to the extent that they exceeded 50 per cent. of the published tariffs. As respects the shipper's rights in the premises the holding in the Doney case above set forth was carefully followed.

(10, 11) In application of the doctrine of *stare decisis* a decision of this court is authority upon the points actually involved, presented and argued by counsel, and passed upon. Accordingly, the language employed in the Doney case above noted is not merely to be considered as *obiter dictum*. After our statutes had received such erroneous construction by this court, the shipments were made and the rates approved by the board of railroad commissioners paid under protest. It must be concluded that the holding in that case gave just basis for the claim of the shipper although the decision in that case now appears to us to be manifestly erroneous, and the shipper's demand should not now be lightly considered or impaired by reason of a change in construction of the statutes by this court. All that is necessary to make a decision of this court authoritative is that there shall appear to have been an application of the judicial mind to the precise question adjudged and that the point was fully considered (*Spratt* v. *Helena Power Transmission Co.*, 37 Mont. 60, 94, p. 631), all of which appears to have been done in the Doney case, and such decision must be considered as controlling until reversed by this court.

In the Doney case, this court apparently fell into the error above pointed out in consequence of the concessions made by counsel for the railway company in support of their contention respecting the insufficiency of

the complaint, in argument that our statutes dealing with the regulation of rates must not be ignored, and have superseded the common-law right of action, which common-law right was relied upon as the basis of Doney's complaint. However, that the decision in that case was fully considered by the court is apparent upon reference to the report thereof and the fact that upon a petition for a rehearing therein the same was denied. We were then apparently satisfied with the correctness of the holding, and thenceforth the profession and others were entitled to place reliance thereon. The construction of the statutes made by this court in this case had been acted upon by the shipper, the carrier, and the railroad commission, and undoubtedly gave rise to the procedure adopted by the shipper in this instance and to the present cause of action. It would be manifestly unjust and improper to deprive the shipper of its legal right to recover the excessive amount of tariff exacted by the railway company as pronounced by this court simply because of the later opinion expressed by this court repudiating its former decision. *Montana National Bank* v. *Yellowstone County*, 276 U. S. 499, 48 S. Ct. 331, 72 L. Ed. 673. The decisions of this court are controlling until reversed or modified by the court itself.

(12) But what of the rights of the carrier as a result of our present views as to the proper contruction to be given our statutes? In our opinion, in all justness and fairness it cannot be said that the carrier has, as a result, been injured, for it must have appreciated its liability under the holding of this court in the Doney case. Furthermore, it appears that in reliance upon the holding in the decision in that case negotiations were under way by which the carrier proposed to make settlement with the shipper allowing reparation to the extent that the rates charged by the carrier under the

published tariff at the time the shipments were made were found by the board of railroad commissioners to be unreasonable. It must also be remembered that on June 12, 1927, prior to the time the shipments involved were made, the board of railroad commissioners by letter called the defendant railway company's attention to the excessiveness of the then existing published tariff for the shipment of wild horses and requested it, as well as the Chicago, Milwaukee & St. Paul Railway Company and the Northern Pacific Railway Company, to reduce the then existing tariffs by 50 per cent. The Milwaukee Railway Company at once responded to the board's suggestion and the reduced rate over its lines became effective June 24, 1927. As to the defendant railroad company, it at first declined to make the proposed reduction, but later, on September 21, 1927, requested the commission to permit it to put into effect such proposed reduced rate on one day's notice, and such reduction in tariff, having been allowed by the commission, became effective on September 24, 1927. Later, on April 9, 1928, following the procedure prescribed in the Doney case, of which the carrier was cognizant, the plaintiff filed its complaint with the board of railroad commissioners charging that it had theretofore on shipments made by it between June 25 and September 26, 1927, been overcharged by the defendant to the extent that the rates prescribed in G. N. Ry. G. F. O. No. 2508-A exceeded 50 per cent. of said tariff, and although the defendant company was duly served with notice, it made no appearance in the proceeding and offered no objections whatsoever to the plaintiff's complaint. Before the reduction of the tariff, by letter addressed to the commission dated September 21, 1927, the defendant railway company appears to have voluntarily admitted the excessiveness of the rate by it theretofore charged under G. N. Ry. G. F. O. No. 2508-A, with consequent reduction of the rate by 50 per cent., which be-

came effective September 24, 1927, in consequence of the board's approval. Therefore, no injustice will now result to the defendant railway company in requiring it to make reparation as to such shipments under the law as declared by this court, in existence at the time the shipments were made; and for the future the board of railroad commissioners, shippers, carriers, and the public will have the benefit and advantage of a more accurate and consistent interpretation of the law. If we were permitted to adhere to the erroneous construction of the statute announced in the Doney case, greater mischief would follow than can possibly result from the operation of the statute as now, we think, correctly, interpreted. Justice is in consequence done in this case without injury because of our previous holding.

For the reasons stated the judgment will stand affirmed.

Affirmed.

CALLAWAY, C. J., and ANGSTMAN and MATTHEWS, J. J., concur.

FORD, J.:

I concur in the result reached, but not with much that is said in the opinion.

On Petition for Rehearing.

GALEN, J.:

The Supreme Court of the United States, in a decision rendered on January 4, 1932 (the very day the opinion herein was announced), in the case of *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co. et al.*, 52 S. Ct. 183, 185, 76 L. Ed. —, on writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit (49 F. (2d) 563), agrees with our views expressed in this case, that commission-made rates do

not warrant reparation on shipments made during their existence upon a subsequent determination of excessiveness.

In the majority decision in that case Mr. Justice Roberts, speaking for the court, said:

> "When under this mandate (of the Interstate Commerce Commission Act) the Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the Legislature, and its pronouncement has the force of a statute. This Court has repeatedly so held with respect to the fixing of specific rates by state commissions, and in this respect there is no difference between authority delegated by state legislation and that conferred by congressional action. * * * As respects its future conduct, the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable rate; and, if the order merely sets limits, it is entitled to protection if it fixes a rate which falls within them. Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi judicial capacity, ignore its own pronouncement promulgated in its quasi legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed."

Mr. Justice Holmes and Mr. Justice Brandeis dissented from an affirmance of the judgment, stating that it "should be reversed for the reasons stated by Judge Hutcheson in the concurring opinion in *Eagle Cotton Oil Co.* v. *Southern Ry. Co.* (*C. C. A.*), 51 F. (2d) 443, 445." Upon reference to Judge Hutcheson's opinion it will be found that his views expressed are

not at variance with those expressed by the majority decision in the Arizona Grocery Company case on the points under consideration in the instant case, nor with our views herein expressed. In distinguishing the rate-making system under some state statutes from the federal act, Judge Hutcheson said: "Under such state systems their Commissions make their rates, and until set aside by the courts they are final and conclusive on carrier and shipper alike."

(13) But, it is most vigorously urged, on petition for a rehearing in this case by the defendant's able counsel, that the plaintiff had no vested rights by reason of the law as heretofore declared by this court in the case of *Doney* v. *Northern Pacific Ry. Co.*, 60 Mont. 209, 199, p. 432. It is argued that the doctrine of *stare decisis* has no application since there was but the one case decided by this court rather than a series of decisions; and that since the question as to the right of reparation was not necessary to a decision in that case, there is no good reason to accord the plaintiff a right to recover reparations in the case before us. As noted on reference to our decision herein, we simply hold that the shippers and carriers were controlled by the law as declared in the Doney case until reversed or modified by this court. To this doctrine we adhere, as it appears to be reasonable, logical, and in accordance with the authorities. The construction given to a statute, although erroneous, before its reversal or modification, becomes a part of it as much as though written into it; and the change made in construction will affect only contracts made thereafter. *Gelpcke* v. *Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Shelby* v. *Guy*, 11 Wheat. (24 U. S.) 361, 6 L. Ed. 495; *Green* v. *Neal*, 6 Pet. (31 U. S.) 291, 8 L. Ed. 404; *Olcott* v. *Fond du Lac County*, 16 Wall. (83 U. S.) 678, 21 L. Ed. 382; *Carroll County* v. *United States*, 18 Wall. 71, 21 L. Ed. 771; *Fairfield* v.

*Gallatin County,* 100 U. S. 52, 25 L. Ed. 546; *Douglass* v. *County of Pike,* 101 U. S. 677, 25 L. Ed. 968; *Louisiana ex rel. Southern Bank* v. *Pilsbury,* 105 U. S. 278, 26 L. Ed. 1090; *Hoven* v. *McCarthy Bros. Co.,* 163 Minn. 339, 204 N. W. 29; *Mason* v. *Nelson,* 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am. St. Rep. 635; *Hill* v. *Atlantic & N. C. R. Co.,* 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606; *City of Sedalia* v. *Gold,* 91 Mo. App. 32; *Falconer* v. *Simmons,* 51 W. Va. 172, 41 S. E. 193; *Haskett* v. *Maxey,* 134 Ind. 182, 33 N. S. 358, 19 L. R. A. 379; *United States Savings Fund & Inv. Co.* v. *Harris,* 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451; *Farrior* v. *New England Mortg. Co.,* 92 Ala. 176, 9 So. 532, 12 L. R. A. 856. And the rule has been applied in criminal cases. *State* v. *Bell,* 136 N. C. 674, 49 S. E. 163; *People* v. *Ryan,* 152 Cal. 364, 92, p. 853; *State* v. *O'Neil,* 147 Iowa, 513, 126 N. W. 454, 33 L. R. A. (N. S.) 788, Ann. Cas. 1912B, 691.

In Lewis' Sutherland on Statutory Construction, the rule is thus stated:

> "A judicial construction of a statute becomes a part of it, and as to rights which accrue afterwards it should be adhered to for the protection of these rights. To divest them by a change of construction is to legislate retroactively. The constitutional barrier to legislation impairing the obligation of contracts applies also to decisions altering the law as previously expounded, so as to affect the obligations of existing contracts made on the faith of the earlier adjudications." Section 485.
>
> "Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence on all future time, it becomes the duty, as well as the right of the court to consider them

carefully and to allow no previous error to continue if it can be corrected. The foundation of the rule of *stare decisis* was promulgated on the ground of public policy, and it would be an egregious mistake to allow more harm than good from it." 26 *Am. & Eng. Ency. Law* (2nd Ed.), p. 184; *Mason* v. *Nelson, supra.*

The petition for a rehearing is denied.

CALLAWAY, C. J., and ANGSTMAN and MATTHEWS, JJ., concur.

FORD, J.:

I concur in the result reached.

(1935)

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# Supreme Court of the United States

October Term, 1932

No. 53.

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GREAT NORTHERN RAILWAY COMPANY,

*Petitioner,*

vs.

SUNBURST OIL & REFINING COMPANY and JOHN H. HAMILTON, Receiver of SUNBURST OIL & REFINING COMPANY,

*Respondents.*

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## BRIEF ON BEHALF OF PETITIONER.

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J. P. PLUNKETT,
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St. Paul, Minn.,
October 19, 1932.

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# Supreme Court of the United States

October Term, 1932

No. 53.

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GREAT NORTHERN RAILWAY COMPANY,

*Petitioner,*

vs.

SUNBURST OIL & REFINING COMPANY and JOHN H. HAMILTON, Receiver of SUNBURST OIL & REFINING COMPANY,

*Respondents.*

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## BRIEF ON BEHALF OF PETITIONER.

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The petition filed by the Great Northern Railway Company seeking a review on a writ of certiorari of the judgment of the Supreme Court of the State of Montana in *Sunburst Oil & Refining Co. v. Great Northern Ry. Co.*, was granted by this court on October 10, 1932.

### I.

### The Opinions of the Court Below.

The opinion of the Supreme Court of the State of Montana, dated January 4, 1932, is reported in *Sunburst Oil & Refining Co. v. Great Northern Ry. Co.*, 7 Pac. (2nd) 927, and is found at page 25 of the record.

The opinion of the Supreme Court of the State of Montana, dated January 4, 1932, in *Montana Horse Products Company v. Great Northern Ry. Co.,* followed in the opinion in *Sunburst Oil & Refining Co. v. Great Northern Ry. Co.,* is reported in 7 Pac. (2nd) 919.

## II.

### Jurisdiction.

The judgment of the Supreme Court of the State of Montana was entered on January 4, 1932 (Rec. p. 25). The petition for rehearing filed by petitioner was denied February 5, 1932 (Rec. p. 45), less than three months prior to the date of the application for the writ of certiorari herein (U. S. Code, Title 28, Sec. 350).

The jurisdiction of the Supreme Court is invoked under paragraph (b) of Section 237 of the Judicial Code, as amended and re-enacted by the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 344).

## III.

### Statement of the Case.

The statutes of the State of Montana vest in the Board of Railroad Commissioners the power and make it the duty of the Commission to make all necessary rates, charges and regulations governing the transportation of freight and passengers by railroad within that state (Secs. 3794-3796, Revised Codes of Montana, 1921). The statutes also forbid, under heavy penalties, the charging or receiving by a railroad company of a greater or less compensation for transportation services performed than that fixed by the Commission (Secs. 3804 and

3805). A method of appeal to the courts from the rates fixed by the Commission is given to carrier and shipper (Secs. 3809 and 3810). See copies of the sections referred to printed in the appendix hereto.

The Commission fixed a rate of 20½ cents per 100 pounds on crude petroleum distillate from Kevin and Sunburst to Great Falls, Montana, subject to an estimated weight of 7.4 pounds per gallon. Respondent shipped 266 carloads of this commodity from Kevin and Sunburst to Great Falls and freight charges were collected thereon at the rate of 20½ cents per 100 pounds computed by using the estimated weight of 7.4 pounds per gallon (Rec. pp. 6-10).

On April 19, 1929, respondent filed a complaint with the Commission alleging that the estimated weight provision was unjust and unreasonable (Rec. p. 10). After hearing, the Commission on October 14, 1929, entered an order in which it ordered, declared and found that the estimated weight of 7.4 pounds per gallon, was unjust and unreasonable to the extent that it exceeded 6.6 pounds per gallon. It further found that the charges paid by respondent on said 266 cars of crude petroleum distillate were unreasonable to the extent that they exceeded charges that would have accrued by the use of the estimated weight of 6.6 pounds per gallon (Rec. pp. 10 to 22).

On April 1, 1930, respondent brought an action against the petitioner in the District Court of Cascade County, Montana, to recover excess charges alleged to have been collected (Rec. pp. 1-3). The case was tried on an agreed statement of facts (Rec. pp. 7-23). On October 17, 1930, judgment was entered in favor of respondent in the amount of $3,262.25 (Rec. pp. 23-24). Petitioner perfected an appeal to the Supreme Court of Montana (Rec. p. 24). Three errors of the trial court were specified (Rec. pp. 30-31):

1. The court erred in entering judgment in favor of respondent and against the appellant in this, that under the statutes and laws of Montana the Board of Railroad Commissioners had no power to make a retroactive finding that the rate of 20½ cents per 100 pounds on crude petroleum distillate from Kevin and Sunburst to Great Falls, based upon an estimated weight of 7.4 pounds per gallon, was unjust and unreasonable.

2. The court erred in entering judgment in favor of respondent and against the appellant in this, that Chapter 257 of the Revised Codes of Montana, 1921, as enforced by the order for judgment and the judgment entered in this proceeding, deprives the appellant of its property without due process of law in violation of Article III, Section 27, of the Constitution of Montana, and of the Fourteenth Amendment to the Constitution of the United States.

3. The court erred in entering judgment in favor of respondent and against the appellant in this, that Chapter 257 of the Revised Codes of Montana, 1921, as enforced by the order for judgment and the judgment entered in this proceeding, impairs the obligation of the contracts between the respondent and the appellant relating to the transportation of the 266 carloads of crude petroleum distillate in question in violation of Article III, Section 11, of the Constitution of Montana and of Article I, Section 10, of the Constitution of the United States.

On November 9, 1931, John H. Hamilton was appointed Receiver of the respondent by an order duly made and given in the United States District Court in and for the District of Montana, and thereafter duly qualified as of said 9th day of November, 1931.

On January 4, 1932, the Supreme Court of Montana rendered a decision in which it held that both rate and weight are neces-

sary factors in determining freight charges; that the practice of using estimated weights in computing freight charges on a commodity like petroleum was not improper; that the Board of Railroad Commissioners had no power to make the finding of unreasonableness and order referred to and that respondent was not entitled to recover damages by way of reparation on account of the transportation of the 266 carloads in question. However, following its decision in *Montana Horse Products Company v. Great Northern Ry. Co.* (decided same day), the Supreme Court held that, under the doctrine of *stare decisis*, because of its misinterpretation of the statutes in a prior case (*Doney v. Northern Pacific Ry. Co.*, 60 Mont. 209, 199 Pac. 432), the judgment of the trial court should be affirmed (Rec. pp. 25-29).

In a petition for rehearing petitioner again pressed for consideration the constitutional questions raised, and called to the attention of the court the fact that its decision was contrary to the decision of this Court in *Arizona Grocery Company v. A. T. & S. F. Ry. Co., et al.*, 284 U. S. 370 (Rec. pp. 30-31). On February 5, 1932, the petition was denied (Rec. p. 45).

In view of the fact, as found by the Supreme Court of Montana, that the estimated weight of 7.4 pounds per gallon prescribed by the Commission to be used in conjunction with the rate of 20½ cents, was a necessary factor with the rate in determining the transportation charges, we have in the argument treated it as a part of the rate and have for convenience referred to the subsequent order of the Commission as one finding a rate fixed by it to have been unreasonable in the past.

## IV.

### Specifications of Error.

1. The Supreme Court of the State of Montana erred in entering judgment in favor of respondent and against the petitioner in this, that Chapter 257 of the Revised Codes of Montana, 1921, as enforced by the judgment entered in this proceeding, deprives the petitioner of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of the State of Montana erred in entering judgment in favor of respondent and against the petitioner in this, that Chapter 257 of the Revised Codes of Montana, 1921, as enforced by the judgment entered in this proceeding, impairs the obligation of the contracts between the petitioner and the respondent, in violation of Article I, Section 10, of the Constitution of the United States.

## V.

## ARGUMENT.

### Points Relied Upon.

A. THE CONSTRUCTION GIVEN TO CHAPTER 257 OF THE REVISED CODES OF MONTANA, 1921, BY THE SUPREME COURT OF MONTANA, MUST BE DETERMINED BY ITS JUDGMENT IN THE CASE AND NOT BY STATEMENTS CONTAINED IN ITS OPINION.

B. CHAPTER 257 OF THE REVISED CODES OF MONTANA, 1921, AS ENFORCED BY THE JUDGMENT OF THE SUPREME COURT OF MONTANA, DEPRIVES THE PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

1. The taking by the state of the private property of one person and giving it to another without the owner's consent is not due process of law and is a violation of the Fourteenth Amendment to the Constitution of the United States.

2. The compensation received by the petitioner and paid by respondent for the transportation of the 266 carloads of petroleum was computed by the use of the rates established by the Commission and therefore became the private property of the petitioner.

3. If the subsequent order of the Commission declaring retroactively that the rate it had prescribed was unreasonable be viewed as a judicial act it does not constitute due process of law for a legislative body cannot pass judgment on its own acts.

4. If the subsequent order of the Commission be viewed as a legislative act with retrospective effect it does not constitute due process of law for a legislative body may not give retro-

spective effect to its enactments so as to deprive one of property that has vested in him under prior acts.

5. The Supreme Court of Montana has construed Chapter 257 of the Revised Codes of Montana, 1921, as giving to the Commission the power to make such a retroactive finding; therefore, Chapter 257, as construed by the Supreme Court of Montana deprives the petitioner of its property without due process of law.

C. THE SUBSEQUENT ORDER OF THE COMMISSION, IF VIEWED AS A LEGISLATIVE ACT, IMPAIRS THE OBLIGATION OF CONTRACTS BETWEEN PETITIONER AND RESPONDENT.

D. IF THE JUDGMENT OF THE SUPREME COURT OF MONTANA BE CONSTRUED AS ONE BASED SOLELY ON THE DOCTRINE OF STARE DECISIS AND NOT AS GIVING TO CHAPTER 257 OF THE REVISED CODES OF MONTANA, 1921, THE CONSTRUCTION REFERRED TO, IT DEPRIVES THE PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

## A.

**The construction given to Chapter 257 of the Revised Codes of Montana, 1921, by the Supreme Court of Montana must be determined by its judgment in the case and not by statements contained in its opinion.**

The Supreme Court of Montana conceded all the points made by petitioner before that court. It said that the Board of Railroad Commissioners had no power to make a retroactive finding of unreasonableness and that the respondent was not entitled to recover damages by way of reparation (Rec. p. 26). In *Montana Horse Products Co. v. Great Northern Ry. Co.*, (7 Pac. 2nd 919), involving the same question and decided the

same day, it said, page 925, that it would be an anomalous situation were the Commission, acting as a quasi-judicial tribunal, permitted to find that the carrier had violated the law because it charged a rate prescribed by the Commission itself acting in its legislative capacity. It also said, page 923, that the language found in *Doney v. Northern Pacific Ry. Co.*, 60 Mont. 209, 199 Pac. 432, stating that the Commission could make such a finding, was not necessary to a decision of that case and had no proper place in the opinion. Yet in spite of these statements it held that under the doctrine of *stare decisis* it must follow the erroneous *obiter dictum* in the *Doney case, supra,* and for that reason it affirmed the judgment of the trial court (Rec. p. 28).

This is an action in tort to recover damages by way of reparation for the charging and collecting of unreasonable freight charges (*Lewis-Simas-Jones Co. v. Southern Pacific Co.*, 283 U. S. 654, 660). It is based upon a finding of past unreasonableness made by the Board of Railroad Commissioners. If the Commission had no power to make such a finding in this case respondent has no cause of action. In entering judgment in favor of respondent the trial court necessarily construed the statutes of Montana as giving to the Commission the power to make such a finding and as giving to respondent a cause of action based on such a finding. In affirming the judgment of the trial court the Supreme Court necessarily approved that construction. It is immaterial by what method of reasoning the court arrived at that decision. The fact is that the judgment is inconsistent with expressions contained in the opinion. But it is the judgment itself that determines the construction given to the Montana statutes.

B.

**Chapter 257 of the Revised Codes of Montana, 1921, as enforced by the judgment of the Supreme Court of Montana, deprives the petitioner of its property without due process of law.**

1. *The taking by the state of the private property of one person and giving it to another without the owner's consent is not due process of law and is a violation of the Fourteenth Amendment to the Constitution of the United States.*

Since the very foundation of our Government it has been held that where once the right to private property has become vested in a person it cannot be taken from him without compensation. *Calder v. Bull,* 3 Dallas 386; *Fletcher v. Peck,* 6 Cranch 87; *Steamship Company v. Joliffe,* 2 Wallace 450; *Osborne v. Nicholson,* 13 Wallace 654.

Since the passage of the Fourteenth Amendment such a taking of property by a state has been held to be a violation of that amendment. *Missouri Pacific R. R. Co. v. Nebraska,* 164 U. S. 403; *Chicago, Burlington & Quincy R. R. v. Chicago,* 166 U. S. 226, 235; *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S. 194; *Ettor v. Tacoma,* 228 U. S. 148; *C. St. P. M. & O. Ry. Co. v. Holmberg,* 282 U. S. 162; *Forbes Boat Line v. Board of Commissioners,* 258 U. S. 338.

2. *The compensation received by the petitioner and paid by respondent for the transportation of the 266 carloads of petroleum was computed by the use of the rates established by the Commission and therefore became the private property of the petitioner.*

There is no dispute as to the fact that the freight charges received by petitioner and paid by petitioner were computed by

the use of the freight rate and estimated weight fixed by the Commission. It is shown by the record (Rec. pp. 6-10) and is stated as a fact in the opening paragraph of the opinion of the Supreme Court of Montana (Rec. p. 25). The contracts for the transportation were valid under the then existing law and order of the Commission; they were fully executed; the compensation provided for had been paid; nothing remained to be done by the petitioner to perfect its right to such compensation; its right was vested. *Steamship Company v. Joliffe, supra,* pp. 457 and 458. There is no analogy between this case and one in which the carrier initiates a rate and a commission subsequently finds that it was unreasonable when collected. The right to retain such compensation is subject to the condition that it was reasonable and if it is later found unreasonable by the Commission the carrier must respond in damages to the shipper. *Arizona Grocery Co. v. A. T. & S. F. Ry. Co.,* 284 U. S. 370. Here the reasonableness of the rate was determined by the Commission before the compensation was collected.

3. *If the subsequent order of the Commission declaring retroactively that the rate it had prescribed was unreasonable be viewed as a judicial act it does not constitute due process of law for a legislative body cannot pass judgment on its own acts.*

It is well settled that when a commission, or other similar creature of the legislature, finds a rate unreasonable which has been charged and collected in the past, it is exercising a quasi-judicial function and when it determines what rate shall be charged in the future it is exercising a quasi-legislative function. *Interstate Commerce Commission v. Ry. Co.,* 167 U. S. 479, 499; *Great Northern Ry. Co. v. Merchants Elev. Co.,* 259 U. S. 285, 291; *Louisville & Nashville Ry. Co. v. Garrett,* 231

U. S. 298, 305. When the Commission established this rate it exercised a quasi-legislative function and when it found the rate unreasonable it exercised a quasi-judicial function.

But courts cannot legislate and pass judgment thereon and legislative bodies cannot render judgment upon their legislative acts. In either case neither the proceeding nor the result would be due process of law. *Western Union Tel. Co. v. Myatt,* 98 Fed. 335, 354. As Chief Justice Kent said in *Dash v. Van Kleeck,* 7 Johns 477, it is a well settled axiom in which theorists and practical statesmen concur, that the union of these two powers is tyranny. Tyranny cannot be due process of law. Or as was said of the Interstate Commerce Commission by this court in the case of *Arizona Grocery Co. v. A. T. & S. F. Ry.,* 284 U. S. 370, the Commission, while not bound by the rule of *res judicata,* was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require but this was obviously the limit of its power, as of that of the legislature itself.

4. *If the subsequent order of the Commission be viewed as a legislative act with retrospective effect it does not constitute due process of law for a legislative body may not give retrospective effect to its enactments so as to deprive one of property that has vested in him under prior acts.*

As previously stated, when a commission finds a rate unreasonable which has been charged in the past it is exercising a quasi-judicial function. But if the subsequent order in this case be viewed as a legislative act with retrospective effect it still does not constitute due process of law for, as we have seen, a legislature has no power to declare retroactively an act to be

unlawful which was lawful when committed or to deprive one of property vested in him under a prior act of the legislature. *Calder v. Bull*, 3 Dallas 386, *Fletcher v. Peck*, 6 Cranch 87; *Steamship Company v. Joliffe*, 2 Wallace 450; *Osborne v. Nicholson*, 13 Wallace 654; *Missouri Pacific R. R. v. Nebraska*, 164 U. S. 403; *Chicago, Burlington & Quincy R. R. v. Chicago*, 166 U. S. 226, 235; *Ettor v. Tacoma*, 228 U. S. 148; and *Forbes Boat Line v. Board of Commissioners*, 258 U. S. 338. Its power is limited to prescribing a rule of conduct for the future. *Arizona Grocery Co. v. A. T. & S. F. Ry. Co.*, 284 U. S. 370.

5. *The Supreme Court of Montana has construed Chapter 257 of the Revised Codes of Montana, 1921, as giving to the Commission the power to make such a retroactive finding; therefore, Chapter 257, as construed by the Supreme Court of Montana deprives the petitioner of its property without due process of law.*

From the foregoing premises we believe it follows that Chapter 257 of the Revised Codes of Montana, 1921, as construed by the Supreme Court of that state, gives to the Commission the power to make the retroactive finding made in this case and gives to the respondent a cause of action against the petitioner based on such finding and thereby deprives the petitioner of its propery without due process of law.

C.

**The subsequent order of the Commission, if viewed as a legislative act, impairs the obligation of contracts between petitioner and respondent.**

The prohibition contained in Article I, Section 10, of the Constitution of the United States applies to executed as well as executory contracts. *Fletcher v. Peck*, 6 Cranch 87, *Dartmouth*

*College v. Woodward,* 4 Wheaton 518; *Green v. Biddle,* 8 Wheaton 1; *Ogden v. Saunders,* 12 Wheaton 213; *Von Hoffman v. City of Quincy,* 4 Wallace 535. It extends to decisions of a Board of Railroad Commissioners. *L. & N. Ry. v. Garrett,* 231 U. S. 298; *King Mfg. Co. v. Augusta,* 277 U. S. 100.

The petitioners and respondents entered into valid contracts for the transportation of the 266 carloads of petroleum at the rate of compensation fixed by the Commission. If the subsequent order of the Commission finding such rate unreasonable is viewed as a legislative act with restrospective effect it impairs the obligation of such contracts in violation of the Constitution of the United States.

D.

**If the judgment of the Supreme Court of Montana be construed as one based solely on the doctrine of Stare Decisis and not as giving to Chapter 257 of the Revised Codes of Montana, 1921, the construction referred to, it deprives the petitioner of its property without due process of law.**

The Supreme Court of Montana held that the Commission could not lawfully declare retroactively that a rate prescribed by it was unlawful (Rec. p. 28). The rates charged by the petitioner for the transportation of the 266 carloads of petroleum were therefore lawful rates (*Arizona Grocery Company v. A. T. & S. F. Ry. Co.,* 284 U. S. 370) and the compensation received for such transportation became the lawful vested property of the petitioner. *Steamship Company v. Joliffe,* 2 Wallace 450.

This is an action in tort (*Lewis-Simas-Jones Co. v. Southern Pacific Co.,* 283 U. S. 654, 660) to recover damages for the charging and collecting of unlawful charges for the transportation of said petroleum. Since the charges collected were not

unlawful no legal right of the respondent was violated and no tort was committed. Consequently the taking of the petitioner's property and giving it to the respondent to compensate the latter for a tort which was admittedly not committed is arbitrary and constitutes the taking of petitioner's property without due process of law. *Missouri Pacific R. R. Co. v. Nebraska,* 164 U. S. 403.

Such violation of the petitioner's constitutional rights cannot be justified by the doctrine of *stare decisis.* No real protection would be afforded by the Constitution if a precedent for the violation of one's constitutional rights could be established in a case between other parties and be then held to be controlling forever thereafter, especially if, as in this case, the precedent were established in what is admitted to be erroneous *dictum* in a previous case. The doctrine of *stare decisis* is not applicable to a decision which has no relation to rights of property, *The Genesee Chief v. Fitzhugh,* 12 Howard 443, 458, and a clearly erroneous decision should be overruled, *Barden v. Northern Pacific Ry. Co.,* 154 U. S. 288, 321, 322. Courts are bound by their very nature to declare what the law is and has been and not what it shall be in the future, and if they were absolutely bound by their prior decisions they would be without the power to correct their own errors. *Wood v. Brady,* 150 U. S. 18, 23.

The Supreme Court of Montana admitted that the precedent it followed was erroneous *dictum* but held that it was bound to follow the erroneous *dictum* because it measured the rights of plaintiff (respondent) and prescribed its remedy. Aside from the obvious answer that one cannot base any rights upon erroneous *dictum,* it is clear that such *dictum* did not measure respondent's rights, for its rights were simply to have its property transported at reasonable rates. The erroneous *dictum*

did not enlarge or modify such rights in any respect; it merely purported to give the respondent an added remedy for the enforcement of such rights. Section 3810 of the Revised Codes of Montana, 1921, gave the shipper a right to appeal to the courts from an order of the Commission fixing rates. The erroneous *dictum* referred to purported to give the shipper the additional remedy of appealing to the Commission itself and obtaining a retroactive finding of unreasonableness. The Supreme Court of Montana now finds that a shipper has but one remedy, viz., the appeal to the courts provided in Section 3810. A party has no vested right to a particular remedy or mode of procedure. *Ogden v. Saunders,* 12 Wheat 213; *Brainard v. Hubbard,* 12 Wall. 1; *League v. Texas,* 184 U. S. 156; *Backus v. Fort Street Union Depot Co.,* 169 U. S. 557; *Luria v. U. S.,* 231 U. S. 9.

Since the erroneous *dictum* did not relate to a right of property but merely to a remedy the doctrine of *stare decisis* would have no application even if the same force were given to *dictum* in a previous case as to a rule of law necessarily decided in such case. In *Pollock v. Farmers' Loan & Trust Co.,* 157 U. S. 429, this court said, p. 574:

> "Doubtless the doctrine of *stare decisis* is a salutary one, and to be adhered to on all proper occasions, but it only arises in respect of decisions directly upon the points in issue."

Inasmuch as the compensation received by the petitioner was lawful and the petitioner did not violate any legal right of the respondent, the judgment of the Supreme Court of Montana against the petitioner and in favor of the respondent, based upon the erroneous application of the doctrine of *stare decisis* to admittedly erroneous *dictum,* is arbitrary and deprives petitioner of its property without due process of law.

## CONCLUSION.

It is, therefore, respectfully submitted that Chapter 257 of the Revised Codes of Montana, 1921, as construed by the Supreme Court of Montana is repugnant to the Constitution of the United States; that the judgment entered in the court below deprives the petitioner of its property without due process of law; and that the order of the Board of Railroad Commissioners, finding that the charges paid by the respondent on the 266 carloads of petroleum in question were unreasonable, impairs the obligation of contracts between the petitioner and the respondent; and the petitioner respectfully prays that the judgment of the Supreme Court of the State of Montana in the case numbered and entitled on its docket No. 6843, Sunburst Oil & Refining Company, a corporation, respondent, v. Great Northern Railway Company, a corporation, appellant, may be reversed by this Honorable Court and that the petitioner may have such other and further relief as may seem meet and just.

Respectfully submitted,

W. L. CLIFT,
R. J. HAGMAN,
J. P. PLUNKETT,
Counsel for Petitioner.

St. Paul, Minn.,
October 19, 1932.

## APPENDIX.

Excerpts from Chapter 257, Revised Codes of Montana, 1921.

Sec. 3794. *Power of board to fix rates, schedules, and classifications.* The power and authority is hereby vested in the said board, and it is hereby made its duty to adopt, as soon as practicable after the organization of the board, all necessary rates, charges, and regulations to govern and regulate freight and passenger tariffs, to correct abuses, and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and to make the same effective by enforcing the penalties prescribed in this act. The said board shall have the power, and it shall be its duty, to fairly and justly classify and subdivide all freight and merchandise of whatsoever character that may be transported over railroads of this state, into such general and special classes or subdivisions as may be deemed necessary or expedient. The said board may fix different rates for different railroads and for different lines under the same management, or for different parts of the same lines, if found necessary to do justice, and may make rates for express companies different from the rates fixed for railroads. Said board shall also have the power, and it shall be its duty, to fix and establish for all or any connecting lines of railroad in this state reasonable joint rates of freight charges for the various classes of freight, and cars that may pass over two or more lines of such railroads. The rates, tolls, or charges on any property, which shall for any reason remain unclassified by the board, shall not in any event exceed the highest rates fixed for any classification by said board. And it shall be within the province of the board to entertain and hear complaints made by any shipper to the effect that unjust discrimination is being made as against the state of Montana,

or any point therein, in the way of rates for the transportation of freight or passengers from points without the state to points within the state, and vice versa; and in proper cases, where it appears that the United States interstate commerce commission law has been violated, it is hereby made the duty of said board to make complaint to the interstate commerce commission of the United States, and to aid such commission in any investigation it may make concerning violations of the United States law, by furnishing evidence, and in any other manner which may seem best suited to enforce both the United States and state law, and to protect the interests of the people.

Sec. 3795. *Making schedules effective.* When any schedules shall have been made or revised, it shall be the duty of said commissioners to cause notice thereof to be published for two successive weeks in some newspaper published in the city of Helena, which notice shall state the date of taking effect of said schedule, and said schedule shall take effect at the time so stated in such notice, and a printed notice of such schedule shall be conspicuously posted by such common carrier in each freight office, and passenger depot upon its lines; provided, that before finally fixing and deciding what the original maximum rates and classifications shall be, it shall be the duty of the railroad commissioners to publish ten days' notice in two daily papers, one of which is published in the city of Helena, setting forth in such notice that at a certain time and place they will proceed to fix and determine such maximum rates and classification; and they shall at such time and place, and as soon as practicable, afford to any person, firm, corporation, or common carrier who may desire it, an opportunity to make an explanation or showing, or to furnish information to said railroad commissioners on the subject of determining and fixing such maximum rates and classification. All classifications and

rates fixed and established by the board shall become effective twenty days after the railroad affected thereby shall have received certified copies thereof from said board. Each railroad affected by the provisions of this act shall display, in a conspicuous place in each of its stations in this state, a schedule printed in plain, legible, English type, showing all classifications and rates fixed and established by the said board. Any failure or refusal on the part of any railroad to comply with the provisions of this section shall subject such railroad to a penalty of not less than one hundred dollars nor more than five hundred dollars for each day that such failure or neglect is continued.

Sec. 3796. *Power to alter classification or rate—Hearing complaint.* The said board shall have the power from time to time to change, alter, amend, or abolish any classification or rate established by it when deemed necessary, and such amended, altered, or new classifications or rates shall be put into effect in the same manner as original classifications or rates. The said board shall make and establish reasonable rates for the transportation of passengers over each and all of the railroads subject hereto, and shall prescribe rates, tolls, and charges for all other services performed by any railroad subject hereto. The said board shall not make or establish any increase or raise in the rate of charge for the transportation of freight by any railroad within the state of Montana, unless ten days' notice be published in two daily papers, one of which shall be published in the city of Helena, setting forth in said notice that at a certain time and place the board will proceed to make and establish such increase or raise in the rate of charge for the transportation of freight; and the board shall at such time and place hold a public hearing thereon, at which time and place the public generally, or any person, firm, or corpora-

tion, shall be given an opportunity to present such facts, information, or statistics as shall be pertinent to the hearing then being held. The said board must, within forty days after the filing with such board of a complaint by a shipper, or other person interested, proceed to investigate and determine the justness and reasonableness of any classification, rate, charge, toll, regulation or order made by said board.

Sec. 3804. *Prohibition against rebates and discrimination.* If any railroad subject hereto, directly or indirectly, or by any special rate, rebate, drawback, or other device, shall charge, demand, or receive from any person, firm, or corporation, a greater or less compensation for any service rendered, or to be rendered, in the transportation of property subject to the provisions of this act, than that fixed by the said board of railroad commissioners for such service, such railroad shall be deemed guilty of extortion, and shall forfeit and pay to the state of Montana not less than five hundred dollars nor more than two thousand dollars for each offense; provided, that nothing herein shall be so construed as to prevent any railroad or railroad corporation from giving excursion rates to or from any point within or without the state.

Sec. 3805. *Discrimination in rates and charges.* If any railroad subject to this act, or its agents or officers, shall hereafter collect, charge, demand, or receive from any person, company, firm, or corporation, a greater rate, charge, or compensation than that fixed and established by the said board of railroad commissioners for the transportation of freight, passenger, or cars, or for the use of any car on the line of its railroad, or any line operated by it, or for receiving, forwarding, handling, or storing any such freight-car, or for any other service performed, or to be performed by it, such railroad and its

agents and officers shall be deemed guilty of extortion, and shall forfeit and pay to the state of Montana a sum not less than five hundred dollars nor more than two thousand dollars.

Sec. 3809. *Action to determine reasonableness of rates or classification.* Any railroad may bring an action in the district court of the county where the principal office or place of business is situated, or in any county where any such classification, rate toll, charge, regulation, or order of the board is applicable, against the said board as defendant, to determine whether or not any such classification, rate, toll, charge, regulation, or order made, fixed, or established by the board under the provisions of this act is just and reasonable; provided, that until the final decision in any such action the classification, rate, toll, charge, regulation, or order of the board affecting rates or charges shall be deemed to be final and conclusive; and provided further, that in any action, hearing, or proceeding in any court, the classification, rate, tolls, charges, regulations, and orders made, fixed, and established by said board shall prima facie be deemed to be just, reasonable, and proper. All costs and expenses incurred in the hearing, trial, or appeal of any action brought under this section shall be fixed and assessed as to the court may seem just and equitable.

Sec. 3810. *Action by shippers.* Any shipper, or other person interested, may bring an action in the district court of the county where the principal office or place of business of such railroad is situated, or in any county where any classification, rate, toll, charge, regulation, or order of the board is applicable, against the said board of railroad commissioners as defendant, to determine whether or not any such classification, rate, toll, charge, regulation, or order, made, fixed, or established by the board under the provisions of this act, is just and reasonable;

provided, that until the final decision in any such action, the classification, rate, toll, charge, regulation, or order of the board affecting rates or charges shall be deemed to be final and conclusive, except as herein otherwise provided; and provided further, that in any action, hearing, or proceeding in any court, the classifications, rates, tolls, charges, regulations, and orders made, fixed, and established by said board shall prima facie be deemed to be just, reasonable, and proper. Costs shall be awarded in all actions brought under the provisions of this section as in other civil causes.

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1931**

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**No. [redacted] 53**

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GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

-vs-

SUNBURST OIL & REFINING COMPANY, and JOHN H. HAMILTON, Receiver of Sunburst Oil & Refining Company,
Respondents.

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## BRIEF OF RESPONDENTS IN RESISTANCE OF PETITION FOR WRIT OF CERTIORARI

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GEORGE E. HURD,
Great Falls, Montana,
*Attorney for Respondents.*

**(36,727)**

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1931**

## No. 913

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

-vs-

SUNBURST OIL & REFINING COMPANY, and JOHN H. HAMILTON, Receiver of Sunburst Oil & Refining Company,
Respondents.

## BRIEF OF RESPONDENTS

### I

### ANALYSIS OF PETITIONER'S THEORY

Notwithstanding the decisions of this court in Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. Ed. 382, and Fleming v. Fleming, 264 U. S. 29, 68 L. Ed. 547, and many other cases, which appear to be conclusive against Petitioner's argument, Petitioner insists that this record presents some federal question not heretofore determined by this court.

Briefly, the record and Petitioner's brief disclose:

1. That in Doney v. Northern Pacific Railway Company, 60 Mont. 209, 199 Pac. 432, the Supreme Court of Montana, construing the same state statutes which it construed in this case (7 Pac. [2d] 927), held that before a shipper can recover in the courts damages for excess rates or discriminations, the discrimination or unreasonableness of the rate must first be passed upon by the Railroad Commission and the fact that the Railroad Commission was not authorized to order reparation does not prevent a shipper, after the rate has been so determined, from maintaining an action in court to recover the excess.
2. That in this case the same court held that the above mentioned doctrine of the Doney case was not the correct interpretation of the state statutes and overruled such decision to that extent.
3. That since the trial court, following the Doney case, rendered its judgment for the excess in favor of respondent, Sunburst Oil & Refining Company, such judgment should be and was affirmed on the doctrines of stare decisis and that the rule in the Doney case, which was in force when the shipper's contracts involved herein were made, became a part of such contracts.

The Petitioner contends that:

(a) This court has jurisdiction under the Act of

February 13th, 1925, U. S. C. Title 28, Section 344, to review the judgment of the Supreme Court of Montana.

(b) That the decision of the Supreme Court of Montana, by its interpretation of state statutes, Chapter 257 of the Revised Codes of Montana, 1921, enforces the state statutes so as to contravene:

(1) The due process clause of the Fourteenth Amendment to the Constitution of the United States.

(2) The provisions of Article I, Section 10, of the Constitution of the United States, which prohibits a State from passing any law which impairs the obligation of contracts.

It would seem that former decisions of this court have determined all of these questions against the Petitioner.

## II

## AS TO JURISDICTION

That the record herein does not present a case warranting this court in assuming jurisdiction to review, on the merits, the decision of the Supreme Court of Montana, seems to be clear.

It is not every claim of infraction of the due process of law clause of the Fourteenth Amendment to the

Constitution of the United States, or of Article I, section 10, thereof, which will invoke the jurisdiction of this court under paragraph (b), section 334, Title 28, U. S. C. A. as it now stands.

Tidal Oil Co. v. Flanagan,
263 U. S. 444, 68 L. Ed. 382;

Western Union Tel. Co. v. Georgia,
269 U. S. 67, 70 L. Ed. 166;

Live Oak Water Users Ass'n v. Railroad Commission,
269 U. S. 354, 70 L. Ed. 305;

Fleming v. Fleming,
264 U. S. 29, 68 L. Ed. 547;

King Mfg. Co. v. Augusta,
277 U. S. 100, 72 L. Ed. 801.

In these cases, as well as in many others, the writ was dismissed for want of jurisdiction even after the cases were argued and submitted.

It is urged, therefore, that the record here does not present a case within the jurisdiction of this court to review on the merits.

## III

## BY THE DECISION PETITIONER WAS NOT DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW

At the hearing before the Board of Railroad Commissioners at which the rate charged was declared excessive and unreasonable, the Petitioner was present. One of its present counsel, Mr. J. P. Plunkett, its

general attorney, participated therein (R. p. 11). He, with Mr. R. J. Hagman and Mr. W. L. Clift, appeared for Petitioner in the trial court (R. p. 5) and in the Supreme Court of Montana (R. pp. 24-38).

The parties hereto were fully heard in the state courts in the regular course of judicial proceedings. The mere fact that the supreme court of Montana overruled its former decision in the Doney case, even though the Petitioner was prejudiced thereby, does not take away its property without due process of law.

Central Land Co. v. Laidley,
159 U. S. 103, 40 L. Ed. 91;

Tidal Oil Co. v. Flanagan,
263 U. S. 444, 68 L. Ed. 382;

Walker v. Sauvinet,
92 U. S. 90, 23 L. Ed. 678;

Head v. Amoskeag Mfg. Co.,
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146 U. S. 162, 36 L. Ed. 925;

Jones v. Buffalo Creek C. & C. Co.,
245 U. S. 328, 62 L. Ed. 325;

Corrigan v. Buckley,
271 U. S. 323, 70 L. Ed. 969;

Brinkerhoff-Faris Trust & Sav. Co., v. Hill,
281 U. S. 673, 74 L. Ed. 1107.

In the last cited case, this court said:

"But our decision in the case at bar is not based on the ground that there has been a retrospective

denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the Federal Constitution and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the Laclede Land & Improv. Co. Case or in the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the Laclede Land & Improv. Co. Case. Neither of these matters raises a federal question; neither is subject to our review."

The Montana Supreme Court had the power to construe the statutes dealing with the Railroad Commission. It had the power to re-examine and overrule the Doney case. Neither of those matters raises a federal question; neither is subject to review by this court.

Brinkerhoff-Faris Trust & Sav. Co., v. Hill, 281 U. S. 673, 74 L. Ed. 1107;

Moore-Mansfield Constr. Co. v. Elec. Inst. Co., 234 U. S. 619, 58 L. Ed. 1503;

Bacon v. Texas,
163 U. S. 207, 41 L. Ed. 132.

Petitioner concedes that the state statutes are valid. It concedes that the Doney case and this case involve only the construction placed upon the statutes by the Supreme Court. It concedes that neither interpretation deprived it of a remedy. Its complaint is that although it enjoyed the remedy, the result was not in its favor.

That being true, this record presents no federal question as to due process.

Enterprise Irr. Dist. v. Farmer's Mutual Canal Co.,
243 U. S. 157, 61 L. Ed. 644;

Castillo v. McConnico,
168 U. S. 674, 42 L. Ed. 622.

## IV

## THE DECISION IS NOT WITHIN THE INHIBITION OF ARTICLE I, SECTION 10, OF THE CONSTITUTION OF THE UNITED STATES

Article I, section 10, of the Constitution of the United States provides:

"No State * * * shall * * * pass any * * * law impairing the obligation of contracts * * *."

By a long line of decisions this Court has held that this constitutional provision is directed only against impairment by legislation, and not by judgments of courts.

Tidal Oil Co. v. Flanagan,
263 U. S. 444, 68 L. Ed. 382;

Fleming v. Fleming,
264 U. S. 29, 68 L. Ed. 547;

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.,
125 U. S. 18, 31 L. Ed. 607;

Central Land Co. v. Laidley,
159 U. S. 103, 40 L. Ed. 91;

St. Paul M. & M. R. Co. v. County of Todd,
142 U. S. 282, 35 L. Ed. 1014;

Columbia Ry. G. & E. Co. v. South Carolina,
261 U. S. 236, 67 L. Ed. 629.

In effect, the situation is that under the rule announced in the Doney case a shipper, by an action in court, could recover for excess freight charges paid a carrier, after the Railroad Commission, without authority to award reparations, had determined that a rate was excessive.

The organic and statutory law of Montana allows a carrier only reasonable compensation, and no more, for the service rendered.

Article XV, sections 7 and 9, Constitution of Montana;
Section 7851, Revised Codes of Montana, 1921.

The Railroad Commission Act deprived the shipper of the common law remedy theretofore allowed him.

Montana Horse Products Co. v. Great Northern Railway Co.,
7 Pac. (2d) 919;

Doney v. Northern Pacific Railway Co.,
60 Mont. 209, 199 Pac. 432.

When the contracts involved herein were made, both

the shipper and carrier knew that if the rates charged were subsequently determined to be excessive the shipper had his statutory remedy to recover the excess from the carrier. The interpretation of the state statutes became a part of the contract.

The decision in this case is to the effect that the shipper, even though the amount charged is excessive, cannot recover such excess where it arose out of a tariff regularly promulgated by the Railroad Commission. In other words, the Supreme Court of Montana held that herein the shipper pursued the wrong remedy, but since the right result was reached, to-wit: that the carrier had improperly come into possession of money which it should not have taken from the shipper, the shipper was entitled to have the money refunded.

Upon the maxim, for every wrong there is a remedy, the decision can be upheld. It is impossible to discover herein any violation of Article I, Section 10, of the Constitution of the United States.

A change of judicial decision as to the construction of a state statute does not render the changed construction an impairment of contract obligations entered into on the faith of the prior construction a legislative change within the prohibition of Article I, Section 10, of the Constitution of the United States.

Fleming v. Fleming,
264 U. S. 29, 68 L. Ed. 547;

Kryger v. Wilson,
242 U. S. 171, 61 L. Ed. 229;

Long Sault Dev. Co. v. Call,
242 U. S. 272, 61 L. Ed. 294;

Cross Lake Shooting & Fishing Club v. Louisiana,
224 U. S. 632, 56 L. Ed. 924;

Turner v. Board of Commissioners,
173 U. S. 461, 43 L. Ed. 768;

Bacon v. Texas,
163 U. S. 207, 41 L. Ed. 132.

In Fleming v. Fleming, 264 U. S. 29, 68 L. Ed. 547 this court said:

"It is urged upon us that the impairment here is legislative, in that the case turned on the effect of § 3376 of the Iowa Code, that the subsequent judicial construction of it became part of the statute, and gave it a new effect as a law. In other words, the contention is that the same statute was one law when first construed before the making of the contract, and has become a new and different act of the legislature by the later decision of the court. This is ingenious but unsound. It is the same law. The effect of the subsequent decisions is not to make a new law, but only to hold that the law always meant what the court now says it means. The court has power to construe a legislative act, but it has no power, by change in construction, to date its passage as a law from the time of the later decision. A statute in force when a contract was made cannot be made a subsequent statute through new interpretation by the courts. Any different view would be at variance with

the many decisions of this court cited in the Flanagan Case.

"For these reasons, we must hold that the claim of plaintiffs in error does not raise a substantial Federal question, and dismiss the writ of error for lack of jurisdiction."

Clearly, Article I, section 10, was not violated by the decision in the Doney case, or in this case.

## V

## COROLLARIES TO MAIN QUESTIONS

Petioner urges two corollaries to its principal propositions.

1. That the construction given by the Supreme Court of Montana to the state statutes must be determined by its judgment in the case and not by its statements in the opinion.
2. That respondent had no vested right in the construction of the state statutes in the Doney case that should be protected by the doctrine of stare decisis.

These corollaries do not appear to have any bearing on the questions here for consideration. In our argument upon the questions above discussed, we believe that we have given full effect to these obviously immaterial propositions. In any event, they afford no grounds for certiorari and do not reflect any light on the questions of due process of law, or impairment of obligations of contract, in so far as those questions are involved in this proceeding.

## VI

## CONCLUSION

From the foregoing, it seems clear that the following propositions have been established:

1. That the case presented by the Petitioner is not one within the provisions of paragraph (b) of section 344, Title 28, U. S. C. A. and this court should not assume jurisdiction thereof for the purpose of reviewing the decision of the Supreme Court of Montana.
2. That by its former decisions this Court has heretofore determined all the questions presented by this record adversely to the Petitioner's contentions.
3. That the state statutes, as construed by the Supreme Court of Montana, did not deprive Petitioner of its property without due process of law, or violate the provisions of the Constitution of the United States against State legislation impairing the obligation of contracts.
4. That the record presents no substantial federal question.

We respectfully urge, therefore, that Petitioner's petition for writ of certiorari be denied.

Respectfully submitted,
GEORGE E. HURD,
Attorney for Respondents.

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CHARLES ELMORE

# Supreme Court of the United States

October Term, 1932

No. 53

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GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

SUNBURST OIL & REFINING COMPANY and JOHN H. HAMILTON, Receiver of SUNBURST OIL & REFINING COMPANY,
Respondents.

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## BRIEF ON BEHALF OF RESPONDENTS

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# Supreme Court of the United States

October Term, 1932

No. 53

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GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

vs.

SUNBURST OIL & REFINING COMPANY and JOHN H. HAMILTON, Receiver of SUNBURST OIL & REFINING COMPANY,

Respondents.

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## BRIEF ON BEHALF OF RESPONDENTS

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I

### Summary

Respondents' brief is based upon three propositions. First, it is maintained that no substantial Federal question is presented. Second, it is urged that upon no theory can petitioner claim that it has been deprived of its property without due process of law or that its obligation of contracts has been impaired. Third, it is pointed out that the judgment of the court below was correctly based upon the rule of *stare decisis*.

The first of these propositions is discussed in section

II of this brief. Section III, which presents an analysis of petitioner's theory, supports the other two propositions.

## II.

### No Substantial Federal Question Is Raised Herein

Petitioner claims the jurisdiction of the Supreme Court under paragraph (b) of Section 237, of the Judicial Code as amended and re-enacted by the Act of February 13, 1925 (U. S. Code Title 28, Sec. 344).

It is well settled that where the Federal question is devoid of merit and unsubstantial because concluded by previous authorities, the duty to affirm, results.

Deming v. Carlisle Packing Co.,
226 U. S. 102, 57 L. Ed. 140;

Tidal Oil Co. v. Flanagan,
263 U. S. 444, 68 L. Ed. 382;

Fleming v. Fleming,
264 U. S. 29, 68 L. Ed. 547;

Western Union Tel. Co. v. Georgia,
269 U. S. 67, 70 L. Ed. 166;

Live Oak Water Users Ass'n. v. Railroad Commission,
269 U. S. 354, 70 L. Ed. 305;

King Mfg. Co. v. Augusta,
277 U. S. 100, 72 L. Ed. 801.

We must determine first whether a Federal question exists and if so, whether it is such a substantial Federal question as to warrant the Supreme Court's jurisdiction.

The specifications of error set out in petitioner's brief claim that Chapter 257 of the Revised Codes of Mon-

tana, 1921, as enforced by the judgment entered by the court below deprives the petitioner of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and impairs the obligation of the contracts between the petitioner and the respondent, in violation of Article I, section 10, of the Constitution of the United States.

This, then, is the basis of petitioner's attempt to invoke the jurisdiction of the Supreme Court by presenting a Federal question.

Article I, Section 10, of the Constitution of the United States provides:

> "No State * * * shall * * * pass any * * * law impairing the obligation of contracts * * *."

By a long line of decisions this Court has held that this constitutional provision is directed only against impairment by legislation, and not impairment by judgments of the courts. The proposition that judicial impairment is included has been so frequently denied that it cannot support a writ of error to a state Supreme Court.

Tidal Oil Co. v. Flanagan,
263 U. S. 444, 68 L. Ed. 382;

Fleming v. Fleming,
264 U. S. 29, 68 L. Ed. 547;

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.,
125 U. S. 18, 31 L. Ed. 607;

Central Land Co. v. Laidley,
159 U. S. 103, 40 L. Ed. 91;

St. Paul M. & M. R. Co. v. County of Todd,
142 U. S. 282, 35 L. Ed. 1014;

Columbia Ry. G. & E. Co. v. South Carolina,
261 U. S. 236, 67 L. Ed. 629;

Bacon v. Texas,
163 U. S. 207, 41 L. Ed. 132.

The Supreme Court has no jurisdiction to review a judgment of a state court when such jurisdiction is based upon an alleged impairment of contract obligations by reason of the alteration by a state court of a construction theretofore given by it to a particular statute in existence when the contract was entered into.

Bacon v. Texas,
163 U. S. 207, 41 L. Ed. 132;

National Mut. Bldg. etc., Ass'n v. Brahan,
193 U. S. 635, 48 L. Ed. 823;

Kryger v. Wilson,
242 U. S. 171, 61 L. Ed. 229;

Long Sault Dev. Co. v. Call,
242 U. S. 272, 61 L. Ed. 294;

Cross Lake Shooting & Fishing Club v. Louisiana,
224 U. S. 632, 56 L. Ed. 924;

Turner v. Board of Commissioners,
173 U. S. 461, 43 L. Ed. 768;

Fleming v. Fleming,
264 U. S. 29, 68 L. Ed. 547.

In the Fleming case, last cited above, the court said:

"It is urged upon us that the impairment here is legislative, in that the case turned on the effect of No. 3376 of the Iowa Code, that the subsequent judicial construction of it became part of the statute, and gave it a new effect as a law. In other words, the contention is that the same statute was one law when first construed before the making of the contract, and has

become a new and different act of the legislature by the later decision of the court. This is ingenious but unsound. It is the same law. The effect of the subsequent decisions is not to make a new law, but only to hold that the law always meant what the court now says it means. The court has power to construe a legislative act, but it has no power, by change in construction, to date its passage as a law from the time of the later decision. A statute in force when a contract was made cannot be made a subsequent statute through new interpretation by the courts. Any different view would be at variance with the many decisions of this court cited in the Flanagan case.

" 'For these reasons, we must hold that the claim of plaintiffs in error does not raise a substantial Federal question, and dismiss the writ of error for lack of jurisdiction.' "

Here we have no subsequent legislation. Clearly, Article I, section 10, was not violated by any decision of the Supreme Court of the State of Montana. This specification of error on behalf of the petitioner does not raise a substantial Federal question.

It has been held by this court that although a Federal question was referred to in the assignment of error in the state court and in the Supreme Court of the United States, it cannot be considered by the latter court on writ of error to the state court, where it does not appear that the state court dealt with the question.

Cox v. Texas,
202 U. S. 446, 50 L. Ed. 1099.

When the validity of a statute or of an authority exercised under a statute was not considered by the state court on the ground of their being repugnant to the Constitution of the United States, the Federal Supreme Court has no jurisdiction.

Michigan Cent. R. Co. v. Michigan Southern R. Co.,
19 How. 378, 15 L. Ed., 689;

Green v. Frazier,
253 U. S. 233, 64 L. Ed. 878;

Columbia Water Power Co. v. Columbia Electric St. R. etc. Co.,
172 U. S. 475, 43 L. Ed. 521;

Scudder v. Coler,
175 U. S. 32, 44 L Ed. 62.

And where it appears that the state court based its judgment on some grounds independent of any Federal question, the United States Supreme Court will not take jurisdiction if the ground is a good and valid one of itself.

Klinger v. Missouri,
13 Wall. 257, 20 L. Ed. 635.

Nothing in the decisions of either this case (7 Pac. [2d] 927) or the case of Montana Horse Products Co. v. Great Northern Ry. Co., (Mont.) 7 Pac. (2d) 919, upon which the decision of this case below was based, contains any reference to either the due process clause of the Fourteenth Amendment or to Article I, section 10 of the Constitution.

The decision below was based entirely upon the construction to be given a state statute and the effect to be

given a prior state decision construing that statute. This is a matter of state procedure alone, and the highest court of the state is the final judge of the powers conferred by the state law in that regard. No question is presented to sustain a writ of certiorari from the Federal Supreme Court to the state court.

King v. West Virginia,
216 U. S. 92, 54 L. Ed. 396.

A decision of the state court resting upon the construction and not upon the validity of a statute of a state does not present a Federal question. And, the validity of a statute is not drawn in question every time rights claimed under such statute are controverted.

Grand Gulf R. etc. Co. v. Marshall,
12 How. 165, 13 L. Ed. 938;
Ferry v. King County,
141 U. S. 668, 35 L. Ed., 895;
Snell v. Chicago,
152 U. S. 191, 38 L. Ed. 408.

So, the construction placed upon Chapter 257 of the Revised Codes of Montana, 1921, by the Supreme Court of Montana in the case of Doney v. Northern Pacific Ry. Co., 60 Mont. 209, 199 Pac. 432 could not possibly be reviewed here. The State Supreme Court in its decision in this case held that this construction was wrong but that respondent had acquired vested rights under the statute as before construed, which rights could not be taken away simply because of the later opinion repudiating its former decision.

Montana Horse Products Co. v. Great Northern Ry Co.,
(Mont.) 7 Pac. (2d) 919, 925.

This court is bound by the decision of the state court in regard to the meaning of the laws of its own state, and its decisions upon such state of facts raises no Federal question.

Turner v. Board of Commissioners,
173 U. S. 461, 43 L. Ed. 768.

The court below has construed Chapter 257 of the Revised Codes of Montana, 1921, according to the petitioner's contention, and in line with this Court's decision in the case of Arizona v. Atchison, Topeka & Santa Fe Ry. Co., 284 U. S. 370, 76 L. Ed. 185.

Montana Horse Products Co. v. Great Northern Ry Co.,
(Mont.) 7 Pac. (2d) 919 at 926.

Yet, petitioner contends that it is being deprived of its property without due process of law. Petitioner had the benefit of a full hearing in the state courts in the regular course of judicial proceedings. It had the opportunity to present its case and be heard in its support. This is all that is guaranteed by the Fourteenth Amendment to the Constitution of the United States. When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law.

Brinkerhoff-Faris Trust & Savings Co. v. Hill,
281 U. S. 673, 74 L. Ed. 1107;

Central Land Co. v. Laidley,
159 U. S. 103, 40 L. Ed. 91;

Tidal Oil Co. v. Flanagan,
263 U. S. 444, 68 L. Ed. 382;

Walker v. Sauvinet,
92 U. S. 90, 23 L. Ed. 678;

Head v. Amoskeag Mfg Co.,
113 U. S. 9, 28 L. Ed. 889;

Morley v. Lake Shore & M. S. R. Co.,
146 U. S. 162, 36 L. Ed. 925;

Bergemann v. Backer,
157 U. S. 655, 39 L. Ed. 845;

Jones v. Buffalo Creek C. & C. Co.,
245 U. S. 328, 62 L. Ed. 325;

Corrigan v. Buckley,
271 U. S. 323, 70 L. Ed. 969.

The Montana Supreme Court had the power to construe the statutes dealing with the Railroad Commission. It had power to re-examine and overrule the Doney case. As shown before, neither of those matters raises a Federal question; neither is subject to review by this court.

Bacon v. Texas,
163 U. S. 207, 41 L. Ed. 132;

Brinkerhoff-Faris Trust & Sav. Co. v. Hill,
281 U. S. 673, 74 L. Ed. 1107;

Moore-Mansfield Constr. Co. v. Elec. Inst. Co.,
234 U. S. 619, 58 L. Ed. 1503.

Petitioner concedes that the state statutes are valid. It concedes that the Doney case and this case involve only the construction placed upon the statutes by the Supreme Court. It concedes that neither interpretation deprived it of a remedy. Its complaint is that although it enjoyed the remedy, the result was not in its favor.

That being true, this record presents no Federal question as to due process.

Enterprise Irr. Dist. v. Farmer's Mutual Canal Co.,
243 U. S. 157, 61 L. Ed. 644;

Castillo v. McConnico,
168 U. S. 674, 42 L. Ed. 622.

Under no theory does petitioner raise a substantial Federal question. In line with the above authorities this case should be dismissed, and the judgment affirmed.

## III

## Analysis of Petitioner's Theory

The theory of petitioner's prayer for the reversal of this case is based on one of the two following propositions:

1. That the construction given to Chapter 257 of the Revised Codes of Montana, 1921, by the Supreme Court of Montana, is in effcet the same construction given this statute in the Doney case (199 Pac. 432) and this construction deprives the petitioner of its property without due process of law and impairs the obligation of contracts between the petitioner and the respondent.

2. That if the judgment of the Supreme Court of Montana be construed as one based solely on the doctrine of *stare decisis* it deprives the petitioner of its property without due process of law.

The first position taken by the petitioner clearly is untenable. From a study of the opinions in this case below and in the Montana Horse Products case (7 Pac. [2d] 927) the court's position is evident. The construc-

tion placed upon Chapter 257 of the Revised Codes of Montana, 1921, by the court in the Doney case (199 Pac. 432) was overruled but the court held that the appellant herein had certain vested rights under the statute as construed by the Doney case and that the appellant should not be deprived of these rights by a change in the construction of the statute. This position was specifically pointed out on the petition for rehearing (7 Pac. [2d] pp. 926.)

The basis for petitioner's second position that the judgment is based solely on the doctrine of *stare decisis* then is correct.

No authority can be found to suppport the basis of petitioner's first position that the construction of the statute is to be determined by the judgment in the case and not by statements obtained in the opinion.

However, even if petitioner's first theory should be adopted as correct there would have been no violation of either the due process clause of the Fourteenth Amendment or Article I, section 10 of the United States Constitution.

In other words, suppose that the construction given the statute in question in the Doney case had been reaffirmed instead of overruled. There would have been no basis for an appeal to this court. In effect, the situation is that under the rule announced in the Doney case, a shipper, by an action in court, could recover for excess freight charges paid a carrier, after the Railroad Commission, without authority to award reparations, had determined that a rate was excessive.

The organic and statutory law of Montana allows a carrier only reasonable compensation, and no more, for the services rendered.

Article XV, sections 7 and 9,
Constitution of Montana;

Section 7851, Revised Codes of Montana, 1921.

Under the common law then, as declared by the Constitution, the shipper had the right of reparation but his rights and remedies were superseded by the statute.

Montana Horse Products Co. v. Great Northern Ry. Co. (Mont.) 7 Pac. (2d) 919, 924;

Doney v. Northern Pacific Ry. Co.,
60 Mont. 209, 227, 199 Pac. 432.

Petitioner loses sight of the fact that when the contracts involved herein were made, both the shipper and the carrier knew that if the rates charged were subsequently determined to be excessive the shipper had his statutory remedy to recover the excess from the carrier. The interpretation of the state statute by the Doney case became part of the contract. How then can the carrier claim to have a vested right in the rate charged in view of the existing statute giving the shipper the right to recover for excess freight charges after the Railroad Commission had determined that a rate was excessive. It is impossible to discover herein any violation of Article I, section 10, of the Constitution of the United States. The respondent simply pursued the remedy prescribed by the statute instead of its common law remedy, in enforcing its rights under this statute.

Petitioner's charge that this construction of the statute

deprived it of property without due process of law cannot be sustained. Petitioner enjoyed the process as pursued under this statute. It was given an opportunity to be heard.

Petitioner acknowledged the unreasonableness of the estimated weight upon which respondent was charged. It participated in the proceedings before the Commission at which the old weight basis was formally declared unjust and unreasonable. It participated in the preparation of the agreed statement of facts.

Rate making and rate regulation are reserved to the State by the Montana Constitution (Art. XV, Secs. 5 and 7). Petitioner could charge only a reasonable rate calculated upon a reasonable basis.

Section 7851, Revised Codes of Montana, 1921.

The Commission certainly had the power to declare this estimated weight unreasonable.

Section 3796, Revised Codes of Montana, 1921.

Under the law, as construed by the Doney case, the shipper had an action for reparations in a district court if a rate were unreasonable. This was the "process" prescribed by the state statutes.

Petitioner was deprived of no property by the order of the Commission declaring that the estimated weight was unreasonable. Petitioner agreed that such a finding was correct.

Having been given full opportunity to be heard petitioner cannot complain as to lack of due process.

Washington ex rel. Oregon R. & N. Co.
v. Fairchild,
224 U. S. 509, 56 L. Ed. 863;

Louisville R. Co. v. Siler,
186 Fed. 176;

L. & N. R. Co. v. Schmidt,
177 U. S. 230, 44 L. Ed. 747;

Ill. Cent. Ry. Co. v. Brewing Co.,
(Ky.) 163 S. W. 239;

Turner Creamery Co. v. C. M. & St. P. Ry. Co.,
(S. D.) 154 N. W. 819.

It does not appear that the overruling of the construction put on the statute by the Doney case was based on any constitutional grounds. This Court accepts the construction by the highest court of a state from which a cause comes before it of the statutes of such state.

C. M. & St. P. Ry. Co. v. Risty,
276 U. S. 567, 72 L. Ed. 703.

Rates are subject to legislative control. The paramount requisites of a rate are that it shall not discriminate and that it shall be reasonable. If it does either, directly or indirectly, it is illegal and invalid, and no pronouncement of the Railroad Commission can make it otherwise. Nor can the railroad urge impairment of contract or lack of due process when compelled to disgorge its illegal charges.

The requirements of the due process clause are satisfied if one has reasonable notice and reasonable opportunity to be heard and to present his claim or defense.

Missouri ex rel. Hurwitz v. North,
271 U. S. 40, 70 L. Ed. 818;

Dohany v. Rogers,
281 U. S. 362, 74 L. Ed. 904.

The correct construction to be placed upon the lower court's judgment is that it was one based solely on the doctrine of *stare decisis*. It held that the decision of the

Doney case was manifestly erroneous but that the holding of that case gave just basis for the claim of the shipper and that the shipper's rights should not be impaired by reason of a change in the construction of the statutes by the court.

Petitioner argues that such a judgment deprives the petitioner of its property without due process of law.

Under the construction placed upon this statute by the Doney case the compensation received could only become the lawful vested property of the petitioner if it were a reasonable rate. The rate was held to be unreasonable hence no property right became vested in the carrier.

On the other hand the obligation of a contract in the constitutional sense is the means provided by law by which it can be enforced. The validity and remedy of a contract are both part of its obligation. Respondent possessed vested rights under its contract with the petitioner.

> State of Louisiana v. City of New Orleans,
> 102 U. S. 203, 26 L. Ed. 132, and see note in 26 L. Ed. 132.

A right arising under a statute becomes a vested right standing independent of the statute.

> Pacific M. S. S. Co. v. Joliffe,
> 69 U. S. 450, 17 L. Ed. 805.

Contrary to petitioner's argument, the Supreme Court of Montana did not hold that respondent had a vested right in a mode of procedure. It held that respondent had a vested right to reparations under the contract between the shipper and carrier. Both shipper and carrier were controlled by the law as declared in the Doney case until reversed or modified by the court. The con-

struction given to a statute, although erroneous, before its reversal or modification becomes a part of it as much as though written into it, and the change made in construction will affect only contracts made thereafter.

Douglass v. County of Pike,
101 U. S. 677, 25 L. Ed. 968;

Anderson v. Santa Anna Township,
116 U. S. 356, 361, 29 L. Ed. 633, 635;

Taylor v. Ypsilanti,
105 U. S. 60, 26 L. Ed. 1008;

Township of New Buffalo v. Cambria Iron Co.,
105 U. S. 73, 26 L. Ed. 1024;

Louisiana v. Pilsbury,
105 U. S. 278, 26 L. Ed. 1090;

Fairfield v. Gallatin County,
100 U. S. 47, 25 L. Ed. 544;

Olcott v. County Board of Supervisiors,
83 U. S. 678, 21 L. Ed. 382;

County of Green v. Conness,
109 U. S. 104, 27 L. Ed. 872.

It would be manifestly unjust and improper to deprive the shipper of its legal right to recover the excessive amount of tariff exacted by the railway company as pronounced by the Montana court simply because of the later opinion expressed repudiating the former decision.

Montana Nat'l Bank v. Yellowstone County,
276 U. S. 499, 72 L. Ed. 673.

Who may sue under a state statute, and when, and under what circumstances are questions for the exclusive determination of state tribunals.

DeSaussure v. Gaillard,
127 U. S. 216, 32 L. Ed. 125.

Petitioner urges that the precedent established in the Doney case was merely dictum which could not be the basis of any rights. This is not so. In the Montana Horse Products case (7 Pac. [2d] 919) it was expressly stated that it was not obiter dictum:

"In application of the doctrine of stare decisis a decision of this court is authority upon the points actually involved, presented and argued by counsel, and passed upon. Accordingly, the language employed in the Doney Case above noted is not merely to be considered as obiter dictum. After our statutes had received such erroneous construction by this court, the shipments were made and the rates approved by the board of railroad commissioners paid under protest. It must be concluded that the holding in that case gave just basis for the claim of the shipper although the decision in that case now appears to us to be manifestly erroneous, and the shipper's demand should not now be lightly considered or impaired by reason of a change in construction of the statutes by this court. All that is necessary to make a decision of this court authoritative is that there shall appear to have been an application of the judicial mind to the precise question adjudged and that the point was fully considered (Spratt v. Helena Power Transmission Co., 37 Mont. 60, 94 P. 631), all of which appears to have been done in the Doney Case, and such decision must be considered as controlling until reversed by this court."

The court was expressing its interpretation of the state statute. The meaning attributed by a state court to a

state statute is accepted by the United States Supreme Court.

Knights of Pythias v. Meyer,
265 U. S. 30, 68 L. Ed. 885.

The rule of *stare decisis* was correctly applied by the Montana Supreme Court. The application of this rule did not violate the due process clause of the United States Constitution.

## IV.

## Conclusion

From the foregoing it seems clear that the following propositions have been established:

1. That the case presented by the Petitioner is not one within the provisions of paragraph (b) of section 344, Title 28, U. S. C. A. since no substantial Federal question is raised herein.

2. That the judgment of the court below is to be construed as one based solely on the doctrine of *stare decisis*.

3. That the state statute as construed by the court below did not impair the obligation of contracts between petitioner and respondent so as to be violative of Article I, section 10, of the Constitution of the United States.

4. That the state statute as construed by the court below did not deprive the petitioner of its property without due process of law within the meaning of the Fourteenth Amendment to the United States Constitution.

5. That the rule of *stare decisis* was correctly applied by the court below.

Therefore, it is respectively urged that this court dis-

miss Petitioner's appeal, and affirm the judgment of the Supreme Court of the State of Montana.

Respectfully submitted,

GEORGE E. HURD,
Attorney for Respondents.

# SUPREME COURT OF THE UNITED STATES.

No. 53.—October Term, 1932.

| | |
|---|---|
| Great Northern Railway Company, Petitioner, *vs.* Sunburst Oil & Refining Company, Respondent. | On Writ of Certiorari to the Supreme Court of Montana. |

[December 5, 1932.]

Mr. Justice Cardozo delivered the opinion of the Court.

Sunburst Oil & Refining Company, the respondent, brought suit against petitioner, Great Northern Railway Company, to recover payments claimed to be overcharges for freight. The charges were in conformity with a tariff schedule approved by the Railroad Commission of Montana for intrastate traffic. After payment had been made, the same Commission which had approved the schedule held, upon a complaint by the shipper, that the rates so approved were excessive and unreasonable. In this action to recover the excess so paid, the shipper recovered a judgment which was affirmed upon appeal. 7 Pac. (2d) 927. The question, broadly stated, is whether the annulment by retroaction of rates valid when exacted is an unlawful taking of property within the Fourteenth Amendment. A writ of certiorari brings the case here.

By a statute of Montana the Board of Railroad Commissioners is empowered to fix rates of carriage for intrastate shipments. The rates thereby established are not beyond recall. They may be changed by the Board itself on the complaint either of shipper or of carrier if found to be unreasonable. Revised Codes of Montana, § 3796. In an action against the Board they may be set aside upon a like showing by a judgment of the court. §§ 3809, 3810. Until changed or set aside, they "shall prima facie be deemed to be just, reasonable and proper." § 3810.

The meaning of the statute was considered by the Supreme Court of Montana in a cause determined in May, 1921. *Doney* v. *Northern Pacific Railway Co.*, 60 Montana 209. A shipper of

lumber brought suit against a carrier to recover transportation charges which were alleged to be unreasonable, though they were in accordance with the published tariff. He did this without a preliminary application to the Board to modify the schedule. He did it without a preliminary suit in which the Board, being brought into court as a defendant, would have opportunity to sustain the schedule and resist the change. The court held that until one of these preliminary conditions had been satisfied, no action for restitution could be maintained against the carrier. It coupled that decision with the statement that upon compliance with one or other of the conditions, the excess, thus ascertained, might be the subject of recovery.

The procedure there outlined was followed by this respondent. It filed a complaint with the Board to the effect that the existing tariff for the carriage of crude petroleum distillate was excessive and unreasonable in that the rate of 20½ cents was based upon an estimated weight of 7.4 pounds per gallon, whereas the actual weight is not more than 6.6 pounds per gallon. The Board sustained the complaint. In doing so it ruled, in conformity with the decision in the *Doney* case, that the published schedule prescribed the minimum and the maximum to which carrier and shipper were required to adhere while the schedule was in force, but that by the true construction of the statute the duty of adherence was subject to a condition or proviso whereby annulment or modification would give a right of reparation for the excess or the deficiency. The revision of the tariff was followed by this suit against the carrier, and later by a judgment for the shipper which is now before us for review.

The appeal to the Supreme Court of Montana was heard at the same time as an appeal in another cause involving a like question, and the two were decided together though with separate opinions. *Montana Horse Products Co.* v. *Great Northern Railway Co.*, 7 Pac. (2d) 919; *Sunburst Oil & Refining Co.* v. *Great Northern Railway Co.*, 7 Pac. (2d) 927. The court held that the ruling in the *Doney* case was erroneous and would not be followed in the future; that a rate established by the Commission had the same effect as one established by the legislature; that the statute giving power to the Commission or the court to declare a rate unreasonable was not to be read as meaning that a declaration of invalidity should apply to intermediate transactions; but none the less that

the ruling in the *Doney* case was law until reversed and would constitute the governing principle for shippers and carriers who, during the period of its reign, had acted on the faith of it. An opinion handed down upon a motion for rehearing restates the rationale of the decision, and perhaps with greater clearness. 7 Pac. (2d) 926, 929. We are thus brought to the inquiry whether the judgment thus rendered does violence to any right secured to the petitioner by the federal constitution.

The subject is likely to be clarified if we divide it into two branches. Was a federal right infringed by the action of the trial court in adhering to the rule imposed upon it in the *Doney* case by the highest court of the state? If there was no infringement then, did one come about later when the Supreme Court of Montana disavowed the rule of the *Doney* case for the future, but applied it to the past?

1. The trial court did not impair a federal right by giving to a statute of the state the meaning that had been ascribed to it by the highest court of the state, unless such impairment would have resulted if the meaning had been written into the statute by the legislature itself. But plainly no such consequence would have followed if that course had been pursued. The *Doney* case was decided, as we have seen, in 1921. The transactions complained of occurred between August, 1926, and August, 1928. Carrier and shipper understood at that time that the rates established by the Commission as the delegate of the legislature were provisional and tentative. Valid for the time being the rates indubitably were, a prop for conduct while they stood, but the prop might be removed, and charges, past as well as present, would go down at the same time. By implication of law there had been written into the statute a notice to all concerned that payments exacted by a carrier in conformity with a published tariff were subject to be refunded if found thereafter, upon sufficient evidence, to be excessive and unreasonable. The Constitution of the United States would have nothing to say about the validity of a notice of that tenor written in so many words into the body of the act. Carrier and shipper would be presumed to bargain with each other on the basis of existing law. *Coombes* v. *Getz*, 285 U. S. 434. The validity of the notice is no less because it was written into the act by a process of construction. *Knights of Pythias* v. *Meyer*, 265 U. S.

30, 32. The inquiry is irrelevant whether we would construe the statute in the same way if the duty of construction were ours and not another's. *Knights of Pythias* v. *Meyer, supra,* p. 33. Enough for us that the construction, whether we view it as wise or unwise, does not expose the court that made it to the reproach of withholding from the carrier the privileges and immunities established by the constitution of the nation.

*Arizona Grocery Co.* v. *The Atchison, Topeka & Santa Fe Railway,* 284 U. S. 370, holds nothing to the contrary. This court in disposing of that case was not dealing with any question of constitutional law. It was construing a federal statute. Congress had delegated to the Interstate Commerce Commission the power to fix rates and to revoke them. The holding was that the grant of power to revoke did not include by fair intendment a power to invalidate by relation the rates established in the past. The opinion of the court does not speak of the constitution, but plants itself upon the statute, and from that source and no other derives its energy. In none of its pages is there a hint, much less a holding, that a denial of due process would result from the declaration of provisional rates if the will to make them provisional had been written into the Commerce Act, and written there in advance of carriage and of payment. The essence of such a system is that under it rates can be "experimentally laid down and experimentally tried out." Hutcheson, J., in *Eagle Cotton Oil Co.* v. *Southern Railway Co.,* 51 F. (2d) 443, 447. The statute of Montana differs in many ways from the act considered by this court. We do not need to ask ourselves the question whether the differences, to our thinking, are important or trivial. There might be no differences at all, and still the meaning of the Montana statute would be a problem for the Montana courts, and not one for us after they had had their say.

2. If the carrier did not suffer a denial of due process through the action of the trial court in subjecting the published tariff to the doctrine of the *Doney* case then standing unimpeached, the petitioner, to prevail, must be able to show that a change was brought about through something done or omitted by the Supreme Court of Montana in deciding the appeal.

We think the posture of the case from the viewpoint of constitutional law was the same after the decision of the appeal as it

was after the trial. There would certainly have been no denial of due process if the court in affirming the judgment had rendered no opinion or had stated in its opinion that the *Doney* case was approved. The petitioner is thus driven to the position that the Constitution of the United States has been infringed because the *Doney* case was disapproved, and yet, while disapproved, was followed. Adherence to precedent as establishing a governing rule for the past in respect of the meaning of a statute is said to be a denial of due process when coupled with the declaration of an intention to refuse to adhere to it in adjudicating any controversies growing out of the transactions of the future.

We have no occasion to consider whether this division in time of the effects of a decision is a sound or an unsound application of the doctrine of *stare decisis* as known to the common law. Sound or unsound, there is involved in it no denial of a right protected by the federal constitution. This is not a case where a court in overruling an earlier decision has given to the new ruling a retroactive bearing, and thereby has made invalid what was valid in the doing. Even that may often be done, though litigants not infrequently have argued to the contrary. *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 450; *Fleming* v. *Fleming*, 264 U. S. 29; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 680; cf. *Montana Bank* v. *Yellowstone County*, 276 U. S. 499, 503. This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.

We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. *Tidal Oil Co.* v. *Flanagan, supra*), that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted. *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Douglas* v. *County of Pike*, 101 U. S. 677, 687; *Lee* v. *Columbia Township Trustees*, 179 U. S. 472, 492; *Harris* v. *Jex*, 55 N. Y. 421; *Menges* v. *Dentler*, 33 Pa. St. 495, 499; *Comm.* v. *Fidelity & Columbia Trust Co.*, 185 Ky. 300; *Mason* v. *Cotton Co.*, 148 N. C. 492, 510;

*Hoven* v. *McCarthy Bros. Co.*, 163 Minn. 339; *Farrior* v. *New England Mortgage Security Co.*, 92 Ala. 176; *Falconer* v. *Simmons*, 51 W. Va. 172.* On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. *Tidal Oil Co.* v. *Flanagan, supra; Fleming* v. *Fleming, supra; Central Land Co.* v. *Laidley*, 159 U. S. 103, 112; see, however, *Montana Bank* v. *Yellowstone County, supra.*** The alternative is the same whether the subject of the new decision is common law (*Tidal Oil Co.* v. *Flanagan, supra*) or statute. *Gelpcke* v. *Dubuque, supra; Fleming* v. *Fleming, supra.* The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first. In making this choice, she is declaring common law for those within her borders. The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. As applied to such transactions we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule. If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process.

*Other cases have been collected in the writings of learned authors: Von Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harvard Law Review 409, 421; Freeman, Retroactive Operation of Decisions, 18 Columbia Law Review 230; Carpenter, Court Decisions and the Common Law, 17 Columbia Law Review 593; also 29 Harvard Law Review 80.

**Cf. Gray, Nature and Sources of the Law, §§ 535-550; Holmes, J., in Kuhn v. Fairmont Coal Co., 215 U. S. 349, 371.

There is still to be considered a question of jurisdiction which has been reserved till this stage of the opinion, for the answer to it becomes easier after a consideration of the merits has brought into clear relief the challenge to the judgment. The first mention of the Fourteenth Amendment to be found in the record is in the petition for rehearing where also there is a statement that the constitutional question was presented on the first hearing of the appeal and is now renewed and amplified. The answer to the petition for rehearing by counsel for the respondent is also in the record and contains what is in substance an admission that the constitutional point had been duly made at the time and in the manner stated by the moving party. The court in denying the application did so by reference to its opinion on a similar motion in a companion suit decided at the same time (*Montana Horse Products Co.* v. *Great Northern Ry. Co., supra*), and nowhere in that opinion did it contest the statement of counsel that the effect of the Fourteenth Amendment had been argued at every stage. We have then in the record what is in essence the stipulation of counsel followed by the acquiescence of the court. Whether this without more avoids the application of the general rule that a constitutional question is urged too late if put forward for the first time upon a petition for rehearing (*American Surety Co.* v. *Baldwin,* — U. S. —, November 14, 1932; *Godchaux Co.* v. *Estopinal,* 251 U. S. 179), we are not required to determine, for here there is more, and that enough to bring the case within a well-recognized exception. The rule, general as it is, does not extend to cases where the constitutional question, however tardily raised, is considered and decided (*Consolidated Turnpike Co.* v. *Norfolk & O. V. Ry. Co.,* 228 U. S. 326, 334; *Cumberland Oil Co.* v. *Board,* 284 U. S. 23), nor does it apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 678; *Missouri ex rel. Missouri Insurance Co.* v. *Gehner,* 281 U. S. 313, 320; *American Surety Co.* v. *Baldwin, supra.* This case is clearly within the second of these exceptions, if it is not also within the first. We have seen that the assault upon the judgment is made along two lines. The first is a challenge to the constitutional validity of the ruling in the *Doney* case, and involves a misconception of the decision in Ari-

*zona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co., supra.* The second is a challenge to the constitutional validity of the ruling in this case whereby the statute is adjudged to mean one thing for some cases and another thing for others. This latter objection the petitioner could not make in advance of the event.

The judgment of the Supreme Court of Montana is accordingly

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*